

9-1-1981

## Child Custody and Parental Authority in France, Louisiana and Other States of the United States: A Comparative Analysis

Christopher L. Blakesley

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Christopher L. Blakesley, *Child Custody and Parental Authority in France, Louisiana and Other States of the United States: A Comparative Analysis*, 4 B.C. Int'l & Comp. L. Rev. 283 (1981), <http://lawdigitalcommons.bc.edu/iclr/vol4/iss2/3>

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Child Custody and Parental Authority in France,  
Louisiana and Other States of the United States:  
A Comparative Analysis

by Christopher L. Blakesley\*

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## I. INTRODUCTION

The last two decades have witnessed a dramatic increase in the number of divorces and annulments in the United States. In 1963, the number of divorces and annulments totalled 428,000. By 1975, the figure had risen to 1,036,000.<sup>1</sup> The number of children involved in such marital break-ups has also increased. In 1963, such children numbered 562,000, whereas in 1975, 1,123,000 children were involved.<sup>2</sup> These numbers mark a disturbing trend. Marital break-ups are typically attended by significant trauma and misery in both parents and children. Methods of alleviating such trauma and misery must be developed. One area in which a legal response is appropriate is the area of child custody. This article considers the legal response to the problem of child custody as one means to mitigate the damaging impact of divorce or annulment on children.

This article will compare possible approaches to the problem of child custody. The law in France, Louisiana and other states of the United States will be studied. France was chosen because its legal system is a prototype of the so-called "civilian" legal systems. The various states of the United States were chosen because they represent prototypes of the "common law" approach. Louisiana was selected because its legal system provides a conceptual bridge between the civilian and the common law approaches. Although geographically surrounded by common law jurisdictions, Louisiana developed its Civil Code from French and Spanish sources. The author suggests that the approach undertaken by these systems significantly influences the nature of the solutions adopted. Each system's view of the law's role in the solution to the difficult problem of child custody is examined. Such an examination provides a new perspective from which to attempt to develop a hybrid solution to the problem in the United States.

The article begins with a discussion of the historical and conceptual roots of the law relating to parental authority in general. Historically, the law of custody evolved from ancient notions of "natural" and substantive rights and authority held by parents over their children. This discussion serves as necessary background for the examination of the law relating to child custody in France, Louisiana and generally in the United States. Thus, the article traces the development of the notion of parental authority through ancient Anglo-Saxon and Roman legal history, through its modernization in feudal

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1. H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 394 (rev. ed. 1976). See also K. SNAPPER & J. OHMS, *THE STATUS OF CHILDREN IN 1977*, 25 U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE (Office of Human Development Services Pub. No. 78-30133, 1978) [hereinafter cited as O.H.D.S. Pub.].

2. O.H.D.S. Pub., *supra* note 1.

England and continental Europe and finally to its current status under both common law and civil law.<sup>3</sup>

Following an examination of the historical and conceptual basis for custody, the article analyzes the current state of the law as it relates to child custody after divorce or separation in France, Louisiana and generally in the United States. Finally, the article considers ways in which the law may be improved. The discussion turns on the following questions: What policies are we attempting to promote through out custody laws? Are the policies different in the different systems? What system best serves its own purposes? How can our laws be changed to better serve our policies?

## II. PARENTAL AUTHORITY IN THE ROMAN, GERMANIC AND ANGLO-SAXON TRADITIONS

### A. Roman Law

#### 1. Ancient Rome

In ancient Rome, the *paterfamilias* (the father or head of the family) exercised absolute authority over his children and his spouse. The formal Roman principle of *patria potestas* (power over one's children) provided the *paterfamilias* throughout his lifetime with absolute power over his children and his spouse,

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3. "Parental authority" may be defined initially as that bundle of rights and obligations which exists between parents and their children. See §§ III. B, C *infra*. Common law legislation and cases have not defined parental authority or custody. Thus, Chief Justice Traynor of the Supreme Court of California (a state which is a common law jurisdiction, although influenced by some civil law tradition) has defined the concept in a manner roughly consistent with the civilian approach. He has stated that parental authority embraces "the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings . . . and control [over] education, health and religion." *Burge v. City of San Francisco*, 41 Cal.2d 608, 612, 262 P.2d 6, 12 (1953).

Generally, in common law jurisdictions today, the ongoing legitimate family is a self-governing unit. *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198 (1925), cited in Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D.L. REV. 523, 537 n.88 (1979) [hereinafter cited as Folberg & Graham]. Theoretically, the law considers both parents the joint natural guardians of their minor children. They have equal powers and obligations. Neither is in a superior position regarding his or her rights and duties, including the right to custody of his or her children. *Id.* at 537. See, e.g., MD. ANN. CODE art. 72a, § 1; UTAH CODE ANN. § 30-2-9, 10.

The authority of the parents over their children during the ongoing marriage includes the rights and obligations to rear, educate, protect, control and discipline their children. See Folberg & Graham, *supra* at nn.93 & 94; Annot., 36 A.L.R. 866 (1925); *People ex rel O'Connell v. Turner*, 55 Ill. 280, 284, 8 Am. Rep. 645 (1870); *Turner v. Turner*, 167 Cal. App. 2d 636, 642, 334 P.2d 1011, 1015 (1959); *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925). Historically, the courts felt that these rights and obligations resided in the parents pursuant to natural law. *People ex rel O'Connell v. Turner*, *supra*; *Newly v. Newly*, 55 Cal. App. 114, 202 P. 891 (1921); 27B C.J.S. Divorce § 308 (1959). See also *Stourton v. Stourton*, 8 DeG. M & G. 760, 771-72 (1857), cited in Friedman, *The Parental Right to Control the Religious Education of the Child*, 29 HARV. L. REV. 485, 491 n.28 (1916) [hereinafter cited as Friedman]; *In re Agar-Ellis*, 24 Ch. D. 317, 337-38 (1883).

including the power to abandon, sell, banish or kill his children.<sup>4</sup> This paternal authority continued throughout the life of the father or the children. It was so all-encompassing that it actually absorbed the legal personality and the patrimony of the children into that of the *paterfamilias*.<sup>5</sup>

This extreme power was gradually diminished during the Roman Empire, at least with regard to the control over the person of the children. Even during the height of the reign of *patria potestas*, the practical application of this immense formal power remained an issue.<sup>6</sup> Practical restraints on the father's power existed from the beginning of Roman history and grew until the *patria potestas* was reduced near the end of the Empire to nothing more than the right, although a powerful one, of correction.<sup>7</sup>

In addition, organized religion created some restraints on the father's exercise of authority. The father was the one charged with *sacraprivata*. As the Romans worshipped their ancestors, the patriarch had the responsibility to ensure the propagation of his ancestral family line. The larger family, therefore, could not have been insensitive to the maltreatment of its children.<sup>8</sup> Although there is no evidence of what constituted excessive or abusive application of patriarchal power, it does appear that the father would not exercise his power over the life of his children without exceptional justification.<sup>9</sup> The father did exercise his authority to banish uncontrollable children or to kill a deformed or crippled child, but he did not exercise this power with impunity.<sup>10</sup>

4. I M. KASER, DAS RÖMISCHE PRIVATRECHT 44-45 (1955) [hereinafter cited as KASER]; H. MAINE, ANCIENT LAW (16th ed. 1897) (1st ed. London 1861) [hereinafter cited as MAINE]; Stoljar, *Children, Parents and Guardians*, IV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Ch. 7 at 16 (1976) [hereinafter cited as Stoljar].

5. Children were *alieni*, not *sui juris*. Stoljar, *supra* note 4. With regard to the children's patrimony, the *paterfamilias* maintained throughout his lifetime at least the usufruct and the right of administration over whatever acquisitions his children might have made during their common lifetimes. Therefore, Roman law viewed all property as being familial property.

In the beginning, the term *pater* did not refer necessarily to the biological father. *Id.* at 17. Indeed, the patriarch had such absolute formal authority that the term referred to the person whose position or status carried with it the responsibility of "protection borne by authority." *Id.*

6. Stoljar, *supra* note 4, at 16.

7. *Id.* at 19.

8. *Id.* at 17. Indeed the father who subjected his children to acts of capricious cruelty without discernable justification was considered a *sacer* (a virtual outlaw). *Id.* I Voigt, ZWÖLF TAFELN, § 15, cited in Pound, *Individual Interests in the Law of Domestic Relations*, 14 MICH. L. REV. 177, 179 n.5 (1916) [hereinafter cited as Pound, *Individual Interests*].

Even down to the end of the Republic, not a little remained solely under the guardianship of the family tribunal or censor's *regimen morum*. Its function was two-fold for sometimes it operated in restraint of law by condemning — though it could not prevent — the ruthless and unnecessary exercise of legal right, as, for example, that of the head of the house-hold over his dependents.

Muirhead, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 21-22 (2d ed.), quoted in Pound, *Individual Interests*, *supra*.

9. Stoljar, *supra* note 4, at 17; KASER, *supra* note 4, at 52.

10. Stoljar, *supra* note 4, at 17.

## 2. Developments Under the Roman Empire

During the Empire, the *patria potestas* was reduced significantly by its rulers. Trajan<sup>11</sup> obliged fathers to emancipate sons who had been maltreated; Hadrian<sup>12</sup> condemned to deportation a father who killed his son, reserving the right to pronounce capital sentences to the state judiciary. Antoninus Caracalla<sup>13</sup> forbade the sale of children except in cases of extreme poverty, while Constantine,<sup>14</sup> followed in this respect by Justinian,<sup>15</sup> restricted such sales to newborns, thus excluding grown children. Under Constantine, in fact, the *ius vitae necisque*<sup>16</sup> no longer subsisted even technically; public sanctions against paternal abuse took the place of earlier interdictions that were enforced only by religion or by a magistrate acting purely on an *ad hoc* basis. Thus, by the time of Constantine, the State had fully intervened and had transformed the old patriarchal family into a "legal family."<sup>17</sup> This transformation closely reflected the family status that has prevailed in the modern world.

### B. Germanic "*Mundium*"

Germanic customary law was pervasive in Europe.<sup>18</sup> Indeed, it represented the central body of European law, with some local variation, in what is now Germany, Central France, Anglo-Saxon England, Scandinavia and Northern Italy.<sup>19</sup>

#### 1. The Germanic Mode

Germanic society was as strongly patriarchal as that of the Romans. However, the Germanic notion of *mund* or *mundium* explicitly included paternal obligations as well as paternal rights. Indeed, the term *mund* or *mund* literal-

11. Marcus Ulpius Trajanus reigned as emperor of the Roman Empire from 98 A.D. to 117 A.D.

12. Publius Aelius Hadrianus reigned as emperor of the Roman Empire from 117 A.D. to 138 A.D.

13. Marcus Aurelius Antoninus reigned as emperor of the Roman Empire from 211 A.D. to 217 A.D.

14. Flavius Valerius Constantinus reigned as emperor of the Roman Empire from 306 A.D. to 337 A.D.

15. Flavius Petrus Sabbatius Justinianus reigned as emperor of the Roman Empire from 527 A.D. to 565 A.D.

16. In Roman law, the *ius vitae necisque* was the power of life and death held by the head of the family over its members. The head of the family "could, usually with the aid of a family council . . . condemn to death and execute sons and daughters and later issue. . . . [B]y the time of Justinian, the *ius vitae necisque* had been reduced to a power to inflict reasonable chastisement." J. THOMAS, TEXTBOOK OF ROMAN LAW 414-15 (1976).

18. By Germanic law, the author refers to the law of the various Germanic peoples from the time of initial contact with the Romans until the change from tribal laws to national territorial laws.

19. Stoljar, *supra* note 4, at 20. See also III M. LAFFERRIÈRE, HISTOIRE DU DROIT FRANÇAIS 58

ly meant "hand." The moral and legal concept of *mund* combines the notions of rights, power and responsibility.<sup>20</sup> This power-protection framework has been the dominant theme of recent French codal development and jurisprudence regarding child custody and parental authority.<sup>21</sup>

Whereas the Roman extended family was formally under the legal power of the *paterfamilias*, its Germanic counterpart was a more informal kinship group containing cooperative, but equal, nuclear families. Each family was headed by an individual patriarch.<sup>22</sup> The interrelationship of these families within the greater family (*Geschlechtsverband*) gave rise to an overseeing body, which provided some effective safeguards against abuse of power by any of the patriarchs.<sup>23</sup> This greater body eventually developed into what became known in France as the family council which promoted the protective theme of the *mundium*.

The patriarch in Germanic custom could be disciplined for abusing his power. The explicit notions of protection implied warnings against abuse. In principle, abuse could result in forfeiture of one's paternal authority.<sup>24</sup> In later Italian city governments, in the period of the Franks, the State withdrew paternal authority from the patriarch when he was adjudged "unworthy" (*indegnita*) or when he was found to have mistreated his child, dissipated the family fortune or persisted in his (the patriarch's) own faith in the face of his child's conversion to Christianity.<sup>25</sup>

## 2. The French Adaptation

The Germanic trend developed in central France through the *droit coutumier* (customary law) which evolved from the French concept of *mainbournie*, meaning *mundium*.<sup>26</sup> In southern France, on the other hand, where the written law ruled (*le pays du droit écrit*), Roman law was carefully followed.<sup>27</sup>

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(1852); K. VON AMIRA, *GERMANISCHES RECHT* (4th ed. 1960). For a discussion of Anglo-Saxon England, see MAINE, *supra* note 4, at 140; E. Young, *The Anglo-Saxon Family Law*, in *ESSAYS IN ANGLO-SAXON LAW*, 151-52 (1905) [hereinafter cited as *Anglo-Saxon, ESSAYS*]; H. WOLFF, *ROMAN LAW* 188, 196, 199, 206 (1951) [hereinafter cited as *WOLFF*]. The general effect of these customs survived the impact of Roman law and continues today.

20. Stoljar, *supra* note 4, at 20.

21. See notes 84-102 and accompanying text, *infra*.

22. Stoljar, *supra* note 4, at 20.

23. *Id.* at 21.

24. In Roman law, no such forfeiture could arise. The kind or degree of abuse that would have resulted in forfeiture under the *mundium* is unclear. *Id.*

25. *Id.*

26. This term is a combination of *main* (hand) and *bourg* or *borg* (surety). *Id.* at 22. This notion can be traced clearly from antiquity through the sixteenth century. The laws were initially codified in the twelfth century in a haphazard way. WOLFF, *supra* note 19, at 207. See also *id.*, at 188, 196, 199, 206, 215, 217.

27. *Id.* at 23.



In French customary law, paternal authority or power (*la puissance paternelle*) belonged not only to the father but also to the mother. Moreover, paternal power ended when a child reached majority age or received express or tacit emancipation. Under *le droit coutumier*, paternal authority extended only to the child's person, and not to his patrimony. In fact, the child's patrimony not only remained his own personal property, but the father, who had the right to administer the patrimony, did not have the right to the usufruct or legal enjoyment of the patrimony.

The system of justice acted as a check over parental authority. For example, the courts had the authority to require a father to emancipate his children if he had mistreated them, contributed to their delinquency, or refused to provide for their support. Thus, under the French *droit coutumier* existed the notion, later incorporated into the Civil Code, that paternal authority was based essentially upon the authority to protect one's children. The Roman view, that parental authority existed as the absolute right of the father for the protection of himself and the family *qua* family, was never part of the French *droit coutumier*.<sup>28</sup>

Paternal power under both the *droit coutumier* and the written law prior to the revolutionary reforms was, nevertheless, extensive. Yet, it took revolutionary reforms to eliminate the paternal right to incarcerate one's children as a measure of paternal correction. The reforms prohibited incarceration without the approbation of a family council as well as the approbation of the president of the district court, which was required to ratify the pronounced detention.<sup>29</sup>

Whereas the Roman *patria potestas* was a charter from the state giving rights and powers to the father for the father and the family, the *mundium*, which was applied in Anglo-Saxon England and central and northern France, was an operational legal concept embedded in custom and administered by the kinship group, and functioned as a *guideline* to protect children.<sup>30</sup> Eventually, the French Civil Code incorporated the *mundium* perception of child protection.

Notwithstanding the general protective and tempering of the *mundium*, the father, unless shown to have excessively abused his power, was free to control

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[T]he territory of France became divided for legal purposes into the area of *droit écrit* [written law] in the South influenced by Roman law, and the area of *droit coutumier* [customary law] in the North, based on Germanic customs (*coutumes*). The dividing line ran parallel with the Loire from the mouth of the Gironde to the Lake of Geneva, so that the northern three-fifths of France as it is today were controlled by the *droit coutumier*, the southern two-fifths by the *droit écrit*. (italics added).

I K. ZWIEGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 69 (1977).

28. See A. WEILL & F. TERRÉ, CIVIL LAW: LES PERSONNES, LA FAMILLE, LES INCAPACITÉS. (4th ed. 1978) [hereinafter cited as WEILL & TERRÉ].

29. See Decree of August 1790, [1790] D. No. 16-24, tit. X, arts. 15-16, regarding judiciary organization, cited in WEILL & TERRÉ, *supra* note 28, at 695.

30. Stoljar, *supra* note 4, at 23.

his family as he wished. Sources do not indicate, however, what specific powers a father had in this regard. The dearth of comment suggests that the father, absent manifest abuse, had no restriction placed on his power.<sup>31</sup>

### C. Anglo-Saxon England

The Germanic notion of *munt* extended to Anglo-Saxon England. We have seen that the power of the patriarch under this system was tempered and controlled. Indeed, at one point in England, the wife was free to repudiate a marriage and to leave, taking her children and half of the marital property.<sup>32</sup>

#### 1. Under the Feudal System

Feudalism and the increased power of the church ended any notion of spousal equality or children's rights. This later English development held the father to be the natural guardian of his children.<sup>33</sup>

In Feudal times, and for an extended period thereafter, the father had the natural right and authority to control his children's education and religious training.<sup>34</sup> "Subject to certain exceptions, the father had absolute right both at common law and equity to determine the form of his children's education and

31. *Id.* at 26.

32. Doms of Aethelobert, Nos. 79-81, cited in Foster & Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321 n.2 (1978) [hereinafter cited as Foster & Freed] states that "if she [the wife] wish to go away with her children, let her have half of the property. If the husband wish to have them, (let her portion be) as one child. If she bears no child, let paternal kindred have the 'fich' and the 'morgengyfe' " *Id.* Feudalism and "the church" later rendered the wife a "non-person."

33. ANGLO-SAXON ESSAYS, *supra* note 19, at 153. Later cases continued to support this notion. See *Stourton v. Stourton*, 8 DeG. M. & G. 760, 771-72 (1857); *Donohue v. Donohue*, 1 S.R.D. 1; 18 N.S.W.W.N. 14, 18 (1901), cited in Friedman, *supra* note 3. See also *In re Agar-Ellis*, 24 Ch. D. 317, 337-38 (1883), where Lord Justice Brown states:

It is not the benefit of the infant as perceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.

*Id.* *In re Meades*, 5 Ir. R. Eq. 98 (1870), cited in Friedman, *supra* note 4, at 489 n.22, holds that the authority of the father to guide and govern the education of his child "is not to be abrogated or abridged without the most coercive reason." Lord Justice Lindley in *In re Newton* [1896] 1 Ch. 740, 748 states:

In no case, however, that I am aware of, where the father has been alive, has the Court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the Court thought fit altogether to deprive him of the custody of his children.

*Id.* See also *In re McGrath* [1893] 1 Ch. 143; *In re Scanlan*, L.R. 40 Ch. D. 200 (1889); *Skinner v. Orde*, L.R. 4 P.C. 60 (1871); *F. v. F.* [1902] 1 Ch. 688; *In re Montagu*, L.R. 28 Ch. D. 82 (1884); *In re Walsh*, 13 L.R. Ir. 269 (1884).

34. See *Andrews v. Salt*, 8 Ch. App. 622 (1873), cited and quoted in Foster & Freed, *supra* note 32, at 322 n.4.

religious training and his wishes had to be respected after his death.”<sup>35</sup> He had the primary right of association with his children and to benefit from their services.<sup>36</sup>

Feudalism and the church established nearly absolute power in the father, making him the *paterfamilias* of the common law.<sup>37</sup> Under feudalism and later through the development of the common law, the father represented a political mechanism for maintaining the “king’s peace” and for ensuring the continuation of the structured property system.<sup>38</sup> The father’s extensive authority over his children and wife, including his right to custody, remained nearly absolute until the celebrated *Shelley’s Case*.<sup>39</sup> As Blackstone noted, the father had a natural right to the custody of his children, while the mother was “entitled to no power [over them], but only to reverence and respect.”<sup>40</sup>

Blackstone’s generalization was essentially true. In the famous case of *King v. de Manneville*,<sup>41</sup> the Court of Chancery held that the father “was entitled by law to the custody of his child.” The court reached this finding even though the father, who had caused the mother to leave by his cruelty, was incarcerated and the child would have to live with the father’s mistress.<sup>42</sup> Lord Mansfield was prepared to act as *parens patriae* for the child, whose father was believed to have conspired to place the daughter in question into prostitution.<sup>43</sup>

## 2. The Rise of Industrialization

*Shelley’s Case* and the Industrial Revolution signified the demise of paternal preference in England.<sup>44</sup> In 1839, *Talford’s Act* modified the nearly absolute rule of paternal preference for legitimate children by providing that mothers

35. *Id.*

36. *Id.* See also Foster, *Dependent Children and the Law*, 18 U. PITT. L. REV. 579 (1957).

37. Foster & Freed, *supra* note 32, at 325.

38. Certainly, in this regard, the common law failed to respect, in any significant way, human dignity, freedom, equality or social cooperative action. See Address by R. Pascal, The Civil Law and Its Study, Louisiana State University Law School, Student Orientation (Sept. 12, 1967).

39. See *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817), cited in Foster & Freed, *supra* note 32, at 325 n.21. In this case, the poet Shelley lost custody of his children because of his atheistic and immoral lifestyle and attitude. *Id.*

40. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (facsimile 1st ed., 1979) [hereinafter cited as BLACKSTONE].

41. 102 Eng. Rep. 1054 (K.B. 1804).

42. Foster & Freed, *supra* note 32, at 326 n.25. See also Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody Support and Visitation After Divorce*, 12 U.C.D.L. REV. 473 (1979) [hereinafter cited as Weitzman & Dixon].

43. *Rex v. Delaval*, 3 Burr. 1413 (1763), cited in Foster & Freed, *supra* note 32, at 325 n.23. See also *Blisset’s Case*, Loft’s Rep. 748 (1773), cited in Foster & Freed, *supra* note 32, at 325 n.24, wherein Lord Mansfield anticipates “the best interests of the child” test. See also *In re Clarke*, L.R. 21 Ch. D. 817 (1882); *In re O’Malley*, 8 Ir. Ch. 291 (1858); *In re Grimes*, 11 Ir. R. Eq. 465 (1877).

44. See Foster & Freed, *supra* note 32, at 341.

had had the right to custody of infants under seven years old.<sup>45</sup> In 1873, this law was further amended to give the mother the right to custody of infants of any age.<sup>46</sup> Underlying both the maternal and paternal preference rules was the general proposition that *parents* had a natural right to the custody of, and authority over, their children.<sup>47</sup>

Although it appears that the absolute "paternal preference" rule did not have any general application in the 19th century United States,<sup>48</sup> under the old common law, a natural right of parents to rear their children clearly applied. This parental right still has not been seriously questioned<sup>49</sup> and, indeed, has been constitutionalized in the United States.<sup>50</sup>

45. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., c. 54.

46. An Act to Amend the Law as to the Custody of Infants, 1878, 36 & 37 Vict., c. 12. See Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 234 n.34 (1975) [hereinafter cited as Mnookin]. See also Folberg & Graham, *supra* note 3, at 531 n.49. An extensive collection of cases regarding the tender years presumption is cited in Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 432-33 (1975) [hereinafter cited as Roth].

47. BLACKSTONE, *supra* note 40, at 441. See also II F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 434-45 (1895); L. HOCHHEIMER, *CUSTODY OF INFANTS* (2d ed. 1899) [hereinafter cited as HOCHHEIMER]. But see R. POUND, *THE SPIRIT OF THE COMMON LAW* 189 (1921) [hereinafter cited as POUND]; II H.J. STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 288-96 (7th ed. 1874). See also cases cited in Warburg, *Child Custody, A Comparative Analysis*, 14 ISRAEL L. REV. 480, 481 n.5 [hereinafter cited as Warburg].

48. Mnookin, *supra* note 46, at 234. Many early cases demonstrate that the mother as well as the father could claim custody. See, e.g., *Cole v. Cole*, 23 Iowa 433, 446 (1867); *Cook v. Cook*, 1 Barb. Ch. 639 (N.Y. 1846); *Bascom v. Bascom*, Wright 632 (Ohio 1834); *People ex rel Barry v. Mercein*, 8 Paige Ch. 46, 69 (N.Y. 1839). See generally J. BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* 518, 520 (1852); A. LLOYD, *LAW OF DIVORCE* 241 (1887), cited in Mnookin, *supra* note 46, at 234 n.34. It did have some application, however. See, e.g., *Baird v. Baird*, 21 N.J. Eq. 384, 393 (1869) (citing the dissent of Justice Sharkey in *Foster v. Alston*, 4 Miss. (6 Howard) 406 (1842)), which states:

We are informed by the first elementary books we read, that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law, and the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization.

*Id.*

See also *Bryant v. Dukehart*, 106 Ore. 359, 210 P. 454 (1922), wherein the court believed that, as husband and wife become one, and the husband is the decision-maker, he naturally was the controlling parent with regard to the children. See also *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80, 81 (1900), cited in Roth, *supra* note 46, at 428.

49. Indeed, it is part of the Judeo-Christian tradition. See T. AQUINAS, *SUMMA THEOLOGICA, TREATISE ON LAW*, reprinted in *THE GREAT LEGAL PHILOSOPHERS* 67 (C. Morris ed. 1959). See also Cortez, *Religious Liberty—The Rights of Parents in the Education of Their Children*, 11 CATH. LAW. 285, 291 (1965).

50. See generally *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351-83 (1980) [hereinafter cited as *Constitution & Family*]. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the United States Supreme Court held that a Nebraska law, which prohibited teaching foreign languages to children below the eighth grade level of schooling, was unconstitutional as it "interfered with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Id.* at 401. A close reading of the case indicates that the Court also relied on the rights of the children

### III. CHILD CUSTODY AND PARENTAL AUTHORITY IN FRANCE

The early development of the Roman and common law concepts of parental authority during the ongoing marriage provides an interesting backdrop to the modern French law relating to parental authority. The French concept of parental authority transcends the bonds of parental matrimony. It explicitly applies to parents of a dissolved marriage and to parents of illegitimate

and the teachers in making its decision. The Court probably was more worried about the homogenization of society than with parental rights per se, but the Court's recognition of the existence of parental authority clearly exists.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that under the doctrine of *Meyer v. Nebraska* the right and authority of parents to send their children to private military school was part of "the liberty of parents and guardians to direct the upbringing and education of [their] children. . . ." *Id.* at 534-35. "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent." *Id.* at 518.

On many occasions, the United States Supreme Court has reinforced this view that parents have the right and authority to rear their own children. In 1944, the Court held that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court stated that this authority was part of the "private realm of family life which the state cannot enter." *Id.* In 1968, the Court declared that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held unconstitutional a Wisconsin law requiring Amish parents to send their children to public school after the eighth grade. The parents believed that such education would estrange their children from God and their religious upbringing. The Court held that Wisconsin could not deny Amish parents the right and authority to direct "the religious upbringing and education of their children in the early and formative years. . . ." *Id.* at 213-14. According to the Court, parents have "fundamental interests . . . to guide the religious future and education of their children." *Id.* at 232. For additional cases addressing the unconstitutionality of state intrusion into the family, see *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The elements of parental authority have not been clearly elaborated. H. CLARK, DOMESTIC RELATIONS § 17.2 at 573 (1978) [hereinafter cited as CLARK]; Folberg & Graham, *supra* note 3, at 537. At least one court has recognized parental authority to include the right and obligation to educate and to control the religious upbringing of one's children. Parental authority has also been recognized to include the power to control and discipline one's children, the duty to provide necessary and appropriate medical care, and the obligation to protect and care for children generally. *Burge v. City of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953). In *Burge*, Chief Justice Traynor defined custody during marriage as that which "embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health and religion." *Id.* at 12. Both Great Britain and Australia have recently passed legislation under which either parent may apply for a court order to partition custodial rights and duties during the ongoing marriage. Folberg & Graham, *supra* note 3, at 538 n.97. See also Gaddis & Bintliff, *Concurrent Custody, A Means of Continuing Parental Responsibility After Dissolution*, A.F.L.C. JOINT CUSTODY HANDBOOK 15 (1979) [hereinafter cited as Gaddis & Bintliff]. See also [1977] 3 FAM. L. REP. (BNA) 4047, 4052. Since 1970, the majority of state laws in the United States provide that parental obligations are parental rights which apply equally to both parents. Folberg & Graham, *supra* note 3, at 538 n.97.1.

children.<sup>51</sup> We will, therefore, consider this concept in two stages: (1) during the ongoing marriage and (2) after dissolution of the marriage or legal separation of the parents.

### A. Recent Reform

Beginning in 1965, significant changes were made in French law regarding marital and parent-child relationships.<sup>52</sup> Essentially, these changes emphasized the equality of the spouses in matters relating to the marriage and to the children of the marriage.<sup>53</sup> The new articles of the Civil Code make it clear that serving the interests of the children is the primary motive to be considered by the court in making its determinations of child custody or other matters relating to a child after the dissolution of a marriage.

#### 1. Paternal Power and Parental Authority

The law of June 4th, 1970, replaced all usage of the term "paternal power" (*puissance paternelle*), which had been the term used at least since the promulgation of the Civil Code, with the term "parental authority" (*l'autorité parentale*). This reform took place in conjunction with a complete reorganization of Title IX of Book One of the French Civil Code.<sup>54</sup>

The changes promulgated by the amendments in 1970, symbolized by the

51. See FR. C. CIV. arts. 286-342, 374.

52. Essentially, new articles 286-295 of the French Civil Code replace former articles 295-305.

53. WEILL & TERRÉ, *supra* note 28, at 699. In 1965, the French began to promulgate amendments to the Civil Code which promoted spousal equality. See, e.g., FR. C. CIV. arts. 213-215, 371-2.

54. WEILL & TERRÉ, *supra* note 28, at 696-98. The new title IX contains forty-three articles instead of the seventeen articles contained in the old title IX (arts. 371-387). The additional articles added to the new title IX include those dispositions of the Law of July 24, 1889, which relate to the forfeiture of parental power. The new title also includes articles designed to ensure additional and more efficient protection of a child after separation, divorce or death of his parents. See, e.g., FR. C. CIV. art. 373-3. The new title IX also includes new dispositions regarding illegitimate children and establishes parental authority in the mother or the father who has acknowledged the child, or in the mother if both parents have acknowledged the child. See FR. C. CIV. art. 374. It also addresses relationships between grandparents and grandchildren, which heretofore had been simply a part of the jurisprudential development. See, e.g., FR. C. CIV. art. 371-4, which provides that although parents have parental authority, including the right to visit and correspond with their children, the parents are prohibited, except for good cause, from creating any obstacle to the personal relationship of their children with either set of grandparents. Indeed, if both parents die, it will likely be the grandparents upon whom the court may confer guardianship. For commentaries on the Law of June 4, 1970, see [1971] *Recueil Dalloz-Sirey, Jurisprudence* [D.S. Jur.] *Chronique* [Chron.] 1 note Colombet; R. LEGEAIS, *L'AUTORITÉ PARENTALE* (1973); Law of June 4, 1970, [1971] *Juris-Classeur Périodique, La Semaine Juridique* [J.C.P.] I No. 2421 note Gobert; TERRÉ, *A PROPOS DE L'AUTORITÉ PARENTALE, RÉFORMES DU DROIT DE LA FAMILLE*, 20 *ARCHIVES DE PHILOSOPHIE DU DROIT* 45 (Sirey, 1975). See also other authorities cited in WEILL & TERRÉ, *supra* note 28, at 696 n.1.

change in terminology from "paternal power" to "parental authority," were significant. For example, the Civil Code ceased to conceive relationships between parents and the child as a matter of simple power and domination based on status. Similarly, the relationship between the husband and wife ceased to be based on status. The new Code articles made it clear that parental authority was conferred upon parents by the Civil Code *for the purpose of protecting the child*. This perspective on the law of paternal authority had already been developed in French jurisprudence and in piecemeal legislation, but had not been, heretofore, manifested in the Civil Code.<sup>55</sup>

Thus, the Civil Code envisions parental authority as being based upon a complex of rights and duties between the parents and their children, having as its purpose the protection of the children. In addition, the 1970 amendments made it clear that parental authority as conceived by the Civil Code is established in both parents in an ongoing marriage, rather than in just the father.<sup>56</sup>

Article 371-2 of the French Civil Code states that parental authority belongs to both parents. Moreover, this article provides that authority belongs to the parents for the purpose of protecting their children's security, health and morals.<sup>57</sup> Parents have the *right* to physical custody and to oversee the rearing and the education of their children. At the same time, however, parents have the corresponding *obligation* to care for, watch over, and properly educate their children. The right of custody over one's children and the more general right of parental authority are granted to the parents only so that they can better perform the obligations and duties owed to their children. Parental authority is not simply a privilege of the holder.<sup>58</sup>

55. See WEILL & TERRE, *supra* note 28, at 696-98.

56. *Id.* At the time of promulgation of the Law of June 4, 1970, the Civil Codes of West Germany, Israel and the Netherlands already provided that the mother and the father exercise equal parental authority. The Louisiana Civil Code provides that parental authority exists for both the father and the mother during their marriage, but that in the case of a difference of opinion between the mother and the father, the father exercises this authority. See LA. CIV. CODE art. 216, para. 2. Similarly, the Swiss Civil Code also provides the father with the power to exercise parental authority should there be disagreement between the two parents. In Belgium, according to the Law of Apr. 8, 1965 regarding the protection of youth, the father has the power of decision in matters relating to parental authority, while the mother retains the capacity to petition the court to question the father's judgment. In Italy, since May 19, 1975, both parents conjointly exercise the *potesta*, or parental authority. In Spain and in Austria, on the other hand, parental authority belongs solely to the father. WEILL & TERRE, *supra* note 28, at 697 n.2.

57. FR. C. CIV. art. 371-2.

58. WEILL & TERRE, *supra* note 28, at 697, 699; Simler, 70 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 685 (1972) [hereinafter cited as Simler].

Prior to June 1970, the rights and obligations of parents were provided for in several texts referred to in the first article of the Law of July 24, 1889, relating to the automatic forfeiture of the rights based upon "paternal power." The major attributes of parental authority, at least since June 4, 1970, include the parental right and obligation of custody and supervision of the

The spouses assume together the responsibility for the guidance of their children both in a material and a moral sense.<sup>59</sup> Moreover, the Civil Code views the matrimonial domicile as being the place that the husband and the wife choose together.<sup>60</sup> Thus, the domicile of the minor nonemancipated children is the familial domicile, rather than the *paternal* domicile as it was under the old law.<sup>61</sup> In accordance with the policy of spousal equality, the parents share the right and obligation to determine together how to rear their children.<sup>62</sup> French law prior to 1970 provided that "paternal power" was held by both the father and the mother, but that during the marriage this power was to be exercised by the father in his capacity as head of the family.<sup>63</sup>

## 2. The Question of Joint Parental Authority.

Joint parental authority was the subject of heated debate in the French Parliament in 1970. It was argued, for example, that joint authority could paralyze the family whenever the parents disagreed with respect to the child's

child, and the right and the obligation to control the child and the child's relationships with others.

59. FR. C. CIV. art. 213.

60. FR. C. CIV. art. 215.

61. See FR. C. CIV. art. 108-2. *But see* LA. CIV. CODE art. 39, which retains the "paternal" domicile, cited in WEILL & TERRÉ, *supra* note 28, at 699.

62. See WEILL & TERRÉ, *supra* note 28, at 699. *E.g.*, both the mother and father must agree to allow the child to leave the familial domicile. FR. C. CIV. art. 371-3.

63. WEILL & TERRÉ, *supra* note 28, at 717. See, *e.g.*, FR. C. CIV. art. 373, para. 1 (amended 1970). Note the similarity between the old French law and current Louisiana Civil Code Article 216. This article provides that when jointly-held parental authority exists, the will of the father prevails when a dispute arises between the father and the mother. LA. CIV. CODE art. 216. To protect third parties who deal with parents having authority over children, the revised French Civil Code, Article 372-2, presumes that either parent, acting alone, within his or her scope of parental authority, has the accord of the other spouse. The other spouse can rebut this presumption, however, by presenting evidence to the contrary. Since June 4, 1970, French Civil Code Article 1384 has established that both parents are jointly and severally liable for damage caused by their minor children who live with them. Each parent is thus liable for the whole of the damage, and the party damaged may sue either one or both of the parents. See S. LITVINOFF, THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE 565-98 (1979) [hereinafter cited as LITVINOFF]. 6 S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS § 21 (1969). See also Judgment of June 12, 1963, Cass. civ. 2e, [1963] J.C.P. IV 103; Judgment of June 13, 1963, Cass. civ. 2e, [1963] J.C.P. IV 103, cited in 62 REV. TRIM. DR. CIV. 115 (1964). See also P. OLLIER, LA RESPONSABILITÉ CIVILE DES PERES ET MERES (1961). Prior to 1970, article 1384 held the head of the household liable. Thus, the father was liable under normal circumstances, and the mother was liable only upon the death of the father or upon the father's forfeiture, for whatever reason, of his parental authority. WEILL & TERRÉ, *supra* note 28, at 702 n.1.

French law relating to parental responsibility for damage caused by minor children, however, is different from that in Louisiana. Louisiana law provides for vicarious liability of the father for any damage caused by their minor unemancipated children residing with them. In the absence of the father, vicarious liability extends to the mother or the guardian. See LA. CIV. CODE art. 2318. French law, rather than establishing vicarious liability, provides a presumption that the parents did not raise their children properly, thus establishing the direct responsibility of those par-



upbringing but refused to seek a judicial resolution. Indeed, the initial 1970 proposal of law, not unlike Article 216 in the Louisiana Civil Code, provided that the father's will would prevail in a dispute between the father and the mother. However, the proposal provided for the wife to bring objections against the exercise of her husband's authority before a competent tribunal. The proposed law was subject to two objections. First, opponents felt that it would maintain the inequality of spouses and the predominance of the male over the female in the family. This predominance would have re-established the bias which existed in the Code prior to the amendment and which was intended to be eliminated by the reforms. Secondly, the authority residing in the head of the family would be confided to the judge in case of dispute, often resulting in a *ménage à trois* between the judge, the husband, and the wife.<sup>64</sup>

The Parliament eventually resolved the problem in the following way: when a dispute arises between the parents with regard to the best interests of the children, "the practice that they [the parents] have utilized in the past in similar situations will establish the rule that governs them now."<sup>65</sup> Thus, through prior practice the parents create their own law. In the absence of such practice, or when the existence or merits of such practice have been placed in dispute, either spouse may petition the court to initiate guardianship proceedings. The judge, after attempting to conciliate the parties, rules on the matters presented to the court.<sup>66</sup>

Whether the Parliament's solution has achieved its goals remains an issue. Because the former law has allowed the father's will to prevail, past practice may tend to support the continuance of the bias. Moreover, in many cases the dispute may not be amenable to resolution through reference to past practice. The judge all too often may be forced to substitute his own judgment for the judgment of the parents.

The Parliament has attempted to establish a mechanism to encourage the resolution of conflicts while respecting the best interests of the children. When the mechanism does not resolve a dispute or creates a dispute, the court, after attempting to conciliate the parties, will determine the best interests of the child.<sup>67</sup>

Moreover, in France, the parents are not liable where they are unable to prevent the act which caused the damage. *See* FR. C. CIV. art. 1384, para. 7. In Louisiana, however, parents are liable whether they would have been able to prevent the act or not.

64. WEILL & TERRÉ, *supra* note 28, at 719-21.

65. FR. C. CIV. art. 372-1, para. 1.

66. *Id.*, para. 2. In France, the judge plays a very active role in matters of guardianship. A judge assigned to the local court of original jurisdiction sits in the capacity of *juge des tutelles* and presides over the guardianship proceeding (*la tutelle*).

67. The laws governing the hearing to determine the best interests of the child include FR. C. PR. CIV. arts. 882-886-2, 887 (as modified by Decree no. 70-1276 of Dec. 23, 1970). *See* WEILL & TERRÉ, *supra* note 28, at 720 n.1. With regard to the jurisdiction or competence of the judge in guardianship proceedings wherein disputes as to the exercise of parental authority exist, *see* Judg-

*B. General Nature of Parental Authority*<sup>68</sup>

Parental authority, as defined by the French Civil Code, is designed to serve the public good. The drafters of the Code have attempted to provide the authority that will best promote the traditional role of the family while safeguarding the rights of the children. Thus, parental authority transcends the will or the wishes of any of the interested parties.<sup>69</sup>

France, like other Civil Code jurisdictions, recognizes the natural relationship between parents and children and specifically provides that children are subjected to the authority of their parents.<sup>70</sup> Yet, parental authority not only comprises the right of parents to raise their children, but also entails the obligation to care for them. This authority and its corresponding obligations exist exclusively for the purpose of protecting the children. Under the French Civil Code parents, upon the birth of their children, assume substantive and enforceable obligations with respect to their offspring. They must care for, raise, educate, provide nourishment and meet all other physical and moral needs of their children. Parental authority imparts to parents a qualified right to be exercised in the best interests of their children. The right does not exist to serve the interests of those who hold that right.<sup>71</sup>

Included within the scope of parental authority is the right to custody of one's children. This right has deep historical roots. Both French tradition and the common law consider the biological parents as the persons most naturally inclined to serve the interests of their children. The Code recognizes that it is in the interests of the children to be in the custody of those persons who naturally have the closest and most loving relationship with them. Thus, in practice, the biological parents are typically accorded custody. Parents are seen to have the right to custody of their children and the right to hold parental authority until their children reach majority. In France, the Civil Code recognizes that (1) it is in the best interests of the children to be under the control and custody of their parents, and (2) the best interests of the parents, the family and the state also will be served by the promotion of this relationship. The right of custody, of course, is subject to divestiture by the courts upon evidence that the primary policy of child protection is not being served by those who have the right to exercise parental authority.<sup>72</sup>

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ment of Feb. 8, 1973, Cour d'appel, Poitiers, [1973] GAZETTE DE PALAIS [GAZ. PAL.] II 692-93 (Sept. 30-Oct. 2, 1973), [1973] D.S. JUR. SOMMAIRES [Somm.] 133; Judgment of Jan. 13, 1973, Trib. gr. inst., Amiens, [1974] GAZ. PAL. I 44. See also commentary regarding these two decisions by Nerson, 72 REV TRIM. DR. CIV. 136 (1974), cited in WEILL & TERRÉ, *supra* note 28, at 720 n.3 [hereinafter cited as Nerson].

68. See FR. C. CIV. arts. 371-387.

69. WEILL & TERRÉ, *supra* note 28, at 693; FR. C. CIV. art. 376.

70. See FR. C. CIV. arts. 371-371-3.

71. WEILL & TERRÉ, *supra* note 28, at 694. See also Simler, *supra* note 58.

72. FR. C. CIV. arts. 371-2, 372, 372-1, 373.

Thus, in order to promote the public good, parental authority is subject to judicial control. Such authority may be removed from the parents, in whole or in part, if the judiciary determines, at the request of a relative, an interested party, or the *ministère public*,<sup>73</sup> that the parent has abused his or her authority, abandoned the child physically or morally or proved himself unfit for the exercise of parental authority.<sup>74</sup> Thus, an abuse of right may attach to any aspect of parental authority.<sup>75</sup> Parental authority is to be exercised primarily in the interests of the child, without neglecting the interests of the family. If parental prerogative is directed towards a contrary goal, for example, in pursuit of selfish interests, the French courts will not hesitate to annul the act, even if the act has legal validity.<sup>76</sup>

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73. This office may function as a public advocate's office and possesses powers similar to a state attorney general's office in the United States.

74. FR. C. CIV. arts. 373, 378-381.

75. For an excellent analysis of the abuse of rights notion, see Cueta-Rua, *Abuse of Rights*, 35 LA. L. REV. 965 (1975).

76. See, e.g., Judgment of Dec. 4, 1894, Cour d'appel, Paris, [1895] Recueil Périodique et Critique [D.P.] II 484; Judgment of Dec. 4, 1894, Cour d'appel, Paris, [1897] Sirey, *Jurisprudence* [S. Jur.] II 73 note Wahl.

In the old French *droit coutumier*, as opposed to the Roman influenced *droit écrit*, paternal power belonged not only to the father but also to the mother. Paternal authority, in customary law, ended when the child reached majority or upon the child's emancipation either through the express act of emancipation or the tacit emancipation through marriage. Paternal authority did not extend to the child's patrimony under customary French law, but only to his or her person. In fact, not only did the child's patrimony remain his own personal property, but the father, who had the right to administer the patrimony, did not even have the right to a legal right of enjoyment over the patrimony. WEILL & TERRÉ, *supra* note 28, at 695.

The *droit coutumier* allowed the state to maintain a degree of control over parents with regard to the exercise of their authority. For example, a court could require a father to emancipate his children if he had mistreated them, had caused them to be delinquent, or had refused to provide food for them. *Id.* Thus, under French customary law we see the development of the notion, later to be incorporated into the French Civil Code, that parental authority or paternal power is nothing more than the authority to protect one's children. The Roman notion that parental authority existed as an absolute right of the father for his protection and for the protection of the family *qua* family, was never part of french *droit coutumier*. *Id.* at 694-95.

After the French Revolution, "revolutionary law" adopted some of the principles of customary law and continued to diminish the absolute paternal power which had been part of the Roman law. For example, the Decree of Aug. 28, 1792, provided that "majors will no longer be subject to parental authority which now covers only minors." *Id.* at 695. This decree was a generalization for all of France of French *droit coutumier*. Specific reforms brought about more significant limitations to a generalized paternal power. For example, the right of parents to disinherit their children pursuant to their parental authority was withdrawn by the Decree of 9 fruct. an. II, quest. 23, promulgated under the Revolutionary regime. *Id.*

Parental power of correction under both customary and written law prior to the revolutionary reforms was extensive. For example, it was not until 1790 that a decree prohibited the right to incarcerate one's children, without the approbation of a family council and the president of the district court, as a measure of paternal correction. Decree of August, 1790, [1790] D. No. 16-24, tit. X, arts. 15-16, cited in WEILL & TERRÉ, *supra* note 28, at 695. The French Civil Code, when it was finally promulgated in 1804, consolidated this modern conception of "paternal power," focusing on the interest of the child, himself. However, the Code was, in some respects, reac-

### 1. Exercise of Parental Authority<sup>77</sup>

The French Civil Code provides that the mother and the father have joint legal authority over their children.<sup>78</sup> In principle, all children who have established maternity or paternity, whether they are legitimate, illegitimate or adopted, are subject to parental authority.<sup>79</sup> Furthermore, parental authority continues to exist until the death of both the father and the mother, or after either parent or *both* have been found by the courts to be unworthy of exercising such authority.<sup>80</sup>

Once both parents have died or have lost their right to exercise parental authority, the child will be placed under guardianship.<sup>81</sup> There is also the

tionary, *i.e.*, with respect to the legal usufruct of the parents over their minor children's property. On this point, the Code took a step backwards. WEILL & TERRÉ, *supra* note 28, at 695.

77. See 3 MAZEAUD, LEÇONS DE DROIT CIVIL, tome 1, 585-86 (6th ed. 1978) [hereinafter cited as MAZEAUD I], where Professor Juglart explains that it is necessary to distinguish the concept of parental authority, which includes the parental right of custody, supervision and education, from other related, yet distinct, rights and obligations of parents vis-à-vis their children. Examples of the latter include: (1) parental consent to marriage, which is exercised by the father and the mother. This consent which passes to the guardian of the children when the parents have forfeited this right or have died; (2) the right to consent to adoption; and (3) the right to emancipate one's children. These latter rights do not derive from parental authority. Thus, according to Professor Juglart, French law may still oblige an emancipated child to obtain his parents' consent to marry. *Id.*

Professor Weill perceives parental authority in a broader sense. He explains that parental authority includes more than those rights which are enumerated in the articles that define parental authority (*i.e.*, the right to physical custody, supervision, control over correspondence, and the legal enjoyment of the child's patrimony) (FR. C. CIV. arts. 371-387). Rather, he contends that the authority extends to any right afforded to parents by the Civil Code. For example, within the notion of parental authority, Professor Weill includes the right to consent to the marriage of the unemancipated minor (FR. C. CIV. arts. 148-164), the right to emancipate one's child (FR. C. CIV. art. 477), the right to consent to the adoption by another person (FR. C. CIV. art. 348), and the right to administer the property of one's children (FR. C. CIV. art. 389). See WEILL & TERRÉ, *supra* note 28, at 698.

78. FR. C. CIV. art. 372.

79. WEILL & TERRÉ, *supra* note 28, at 716. FR. C. CIV. art. 374, para. 1. With regard to adoption, see FR. C. CIV. arts. 343, 370-2. In Louisiana, parental authority never arises for the parents of illegitimate children (LA. CIV. CODE art. 238), and it ends with majority or emancipation (LA. CIV. CODE art. 261), separation judgment (LA. CIV. CODE art. 246), or dissolution of marriage (LA. CIV. CODE art. 246).

80. FR. C. CIV. arts. 373, 378-81; WEILL & TERRÉ, *supra* note 28, at 721-22.

81. For the law relating to guardianship, see FR. C. CIV. arts. 378-475. Both guardianship and parental authority terminate upon emancipation or majority of the child. In addition, the court establishes guardianship when a child has not established filiation with either his father or his mother. WEILL & TERRÉ, *supra* note 28, at 716-17.

Article 390 of the French Civil Code specifies that guardianship does not begin until the father and the mother have died, or until the court has deprived them of their parental authority pursuant to the Civil Code. FR. C. CIV. art. 390. See also FR. C. CIV. art. 373. Furthermore, when there is neither a mother nor a father to exercise parental authority, the Code requires the court to initiate guardianship proceedings. Article 373 also provides an exception to the general principle that guardianship will not arise until the death of both parents. It provides that a parent will forfeit his or her parental authority (1) if the parent, by reason of incapacity, absence, distance or

possibility that a French court will establish a program similar to Louisiana's "split tutorship." In such a situation, authority continues with the parents, but a special tutorship is established in some person or institution to manage the child's estate.<sup>82</sup>

In French law, only the father and the mother obtain parental authority. No other person, including the grandparents, can have such authority.<sup>83</sup> In France, if one parent dies, parental authority continues in the surviving parent. If one parent has forfeited his or her right of parental authority, such authority continues in the other parent.<sup>84</sup>

The most important elements of parental authority, insofar as this study is concerned, are the rights and obligations of custody, supervision, and education. Parental authority includes the general right and obligation to oversee the child's general guidance and rearing.

According to French doctrine and jurisprudence, parental authority includes the right to prohibit any relationship that is judged by the person having parental authority to be dangerous or contrary to the best interests of the child.<sup>85</sup> The Code also specifies that parental authority includes general control over the child's person.<sup>86</sup> Thus, parental authority provides the parents with a quasi-sovereign power.

any other cause, is rendered incapable of exercising his or her volition; (2) if the parent has consented to the delegation of his or her rights in accordance with the rules established in Chapter X § III; (3) if the court finds that the parent has abandoned his or her obligations to the child, and has not resumed such obligations over a six-month period; and (4) if parental authority has been judicially terminated or withdrawn in whole or in part. FR. C. CIV. art. 373. Author's translation.

Article 390 of the French Civil Code provides an additional situation in which guardianship arises prior to the death of the mother and the father; that is, when neither parent has recognized or voluntarily acknowledged an illegitimate child. Article 390 states that guardianship proceedings must be opened when the father and the mother are both deceased or are in one of the situations described in article 373. Guardianship proceedings will also commence on behalf of an illegitimate child if neither the father nor the mother has voluntarily recognized the child. FR. C. CIV. art. 390.

In France, as opposed to Louisiana, parental authority over the child's person may exist in the parents even after a court has established guardianship. The fact of guardianship, however, puts an end to the parent's legal administration over the child's estate.

82. FR. C. CIV. art. 391. When such a situation arises, the parents maintaining their parental authority, will continue to have the right to the legal enjoyment of the child's estate. WEILL & TERRÉ, *supra* note 28, at 717.

83. WEILL & TERRÉ, *supra* note 28, at 717. FR. C. CIV. arts. 371-2, 376.

84. FR. C. CIV. arts. 373-1, 373-3.

85. *See, e.g.*, FR. C. CIV. art. 371-3 (prohibits the child from leaving the family household without permission of his father and mother); FR. C. CIV. art. 108-2 (provides that the domicile of a child is that of his parents or the parent with whom he resides).

86. WEILL & TERRÉ, *supra* note 28, at 702. The parents may not restrict the right of visitation belonging to the child's grandparents, FR. C. CIV. art. 371-4, nor of any other person deemed by a court to have such a right. FR. C. CIV. art. 371-4, para. 2. The provision in Article 371-4, paragraph 2, that the court may recognize and award a right of visitation and correspondence to individuals not having parental authority was simply a legislative recognition of prior

## 2. Forfeiture of Parental Authority

In principle, parental authority and custody are quasi-absolute rights which may be removed from the parents only in cases of necessity.<sup>87</sup> French Civil Code Article 373 provides that a parent will forfeit his parental authority under the following circumstances:

- 1) if, due to incapacity, absence, distance, or any other cause he is incapable of exercising his volition;
- 2) if he has consented to a delegation of his power;
- 3) if he has been convicted for failure to meet his familial obligations, either moral or pecuniary (*abandon de famille*), to the extent he has not resumed such obligation over a six-month period;
- 4) if his parental authority has been judicially terminated or withdrawn as to some or all of his rights.

In addition to the provisions of Article 373, the French Penal Code, in conjunction with Civil Code Article 378 and 378-1, provides for forfeiture and penal sanctions in cases of abandonment or abuse of parental authority.<sup>88</sup>

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jurisprudence. See, e.g., Judgment of Mar. 29, 1966, Cass. Civ. 1re, [1966] D.S. Jur. 369 note Rouast, [1966] J.C.P. II 14737. See also Nerson, 64 REV. TRIM. DR. CIV. 782, 789-94 (1966), in which an adulterous father was recognized by the court as having a right of visitation with his child. See also Judgment of Jan. 9, 1969, Cour d'appel, Paris (Ch. 1re), [1969] D.S. Jur. 144 note R.D.; Nerson, 67 REV. TRIM. DR. CIV. 317 (1969), cited in WEILL & TERRÉ, *supra* note 28, at 701 n.4. See also articles of the CODE DE FAMILLE ET D'AIDE SOCIALE (as modified by Decree of Jan. 7, 1959), [1959] D. No. 59-101, cited in MAZEAUD I *supra* note 77, at 589.

87. FR. C. CIV. art. 371-3.

88. The notion of abandonment in the French Penal Code, found in Articles 357-1 and 357-2, contemplates not only physical abandonment by leaving the family domicile, but also includes moral abandonment. See, e.g., FR. C. PÉN. art. 349. French Civil Code Articles 378 and 378-1 provide:

The father and mother may forfeit their parental authority by an express disposition of a penal judgment, if they are found guilty, either as perpetrators, co-perpetrators, or accomplices of a crime or offense committed upon the person of their child, or as co-perpetrators or accomplices of a crime or offense committed by their child. This forfeiture is applicable to ascendants in addition to the father and the mother for any aspect of parental authority that may devolve upon them over their descendants.

FR. C. CIV. arts. 378, 378-1.

Parents who manifestly endanger the security, health or morals of their child through ill-treatment, habitual drunkenness, notorious misconduct or delinquency, or through lack of proper care or guidance may, apart from any penal action, forfeit their parental rights. Where the court has ordered special measures to assist the child in his moral and social education (*l'assistance éducative*), the father and the mother may forfeit their parental authority upon failure to exercise, for over two years, those parental rights and duties remaining under article 357-7.

A member of the child's family, the child's guardian or the *ministère public* can bring judicial proceedings before the ordinary court of original jurisdiction (*tribunal de grande instance*). FR. C. CIV. art. 378-1. Author's translation. The judge has authority to order special measures of assistance for the child. FR. C. CIV. art. 375-1. Article 375-7 provides:

The parents of a child subject to court-ordered special assistance (*des mesures d'assistance éducative*) conserve over that child their parental authority and exercise all of the attributes of parental authority that are not inconsistent with the application of the said

French jurisprudence views forfeiture of parental authority more as a matter of protection for the child than as a punishment or penalty to the parents.<sup>89</sup>

Initial revocation of parental authority or its forfeiture is provisional. Under Article 381 of the Civil Code, parents may have their forfeited authority or any part of it, re-established. No action for the re-establishment of parental authority may be brought until one year after the judgment of forfeiture has been made final. If the parents' request for the re-establishment of parental authority is denied by the court, and this denial has been made final, the parents must wait another year before they can renew their request. Should the child be placed for adoption before the parents request the restitution of their rights, the parents have lost their right to consent to adoption. Once this occurs, the parents have lost their right to the re-establishment of parental authority notwithstanding any change with regard to their fitness.<sup>90</sup>

#### a. *Conjoint Exercise of Parental Authority*

Parental authority and the exercise thereof during the marriage belong to both parents conjointly.<sup>91</sup> Should one parent die or be deprived of the right to exercise parental authority, the other parent retains exclusive authority, even if that parent had not been exercising it up to that moment.<sup>92</sup>

order. They cannot emancipate their child without the authorization of the juvenile judge, as long as the order is in force. If it has been necessary to place the child outside the parents' home, the parents conserve a right of correspondence and a right of visitation. The judge fixes the conditions thereof and may even, if the interests of the child so require, decide that the exercise of these rights, or any one of them, will be provisionally suspended. *Id.* Author's translation.

Although forfeiture may be partial, most often it will be total, and will include patrimonial as well as personal aspects. Unlike the pre-reform law, children born after the judgment of forfeiture are not affected automatically by operation of the law. *See* FR. C. CIV. arts. 379, 379-1.

89. WEILL & TERRÉ, *supra* note 28, at 748. Article 203 of the French Civil Code provides that the spouses, by the sole fact of their marriage, have contracted to nourish, support and raise their children. Articles 349, 352, and 357-1 of the French Penal Code recognize abandonment as a criminal offense. Interestingly, the French have established a mechanism whereby parents may be able to avoid criminal sanction for abandonment of a child if they deliver the child to an institution which cares for abandoned children. *See* CODE DE FAMILLE ET D'AIDE SOCIALE art. 55. It was understood, as early as 1811, that such institutions were necessary in order to avoid infanticide. The Decree of 1811 established the first of these institutions, known as *tours*, in convents and orphanages. In order to "dispose" of a child, a parent would anonymously place his child in a turning box set in the wall of the convent; once the child in the box was turned, the child was received by the convent and the parent could rest assured that the convent had received the child and would care for him. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 626-36 (2d ed. 1976).

90. FR. C. CIV. art. 381, para. 2.

91. FR. C. CIV. art. 372.

92. FR. C. CIV. art. 373-3.

French Civil Code Article 373 lists four situations in which parental authority may no longer be exercised conjointly. These articles provide a great deal of assistance to the judge in cases of divorce and legal separation.<sup>93</sup>

Whenever the right to exercise one's parental authority is lost, the right to exercise that authority devolves upon the other spouse.<sup>94</sup> Article 380 of the French Civil Code provides that if the other parent is unable or unfit to exercise parental authority, the child will be placed in guardianship and confided to the authority of the National Social Services Office for Children in that district (*service départemental de l'aide sociale à l'enfance*) or to the care of a particular guardian.<sup>95</sup>

#### b. *Divorce and Separation*

Pursuant to recent reform, French courts no longer award custody solely on the basis of fault in the case of divorce or separation.<sup>96</sup> Under the former legislation, courts were supposed to award custody to the parent who obtained the divorce.<sup>97</sup> At that time, only the spouse not at fault for the break-up of the marriage could obtain a divorce. Thus, it was assumed that the person against whom a divorce judgment was rendered was at fault.

However, the elimination of the notion of fault and the formal promulgation of "the best interests of the child" standard actually do nothing more than to codify the pre-existing jurisprudence. The new legislation provides that the rights and obligations of both parents toward their children subsist after divorce or separation. Under this legislation, courts award custody to one of the spouses, or exceptionally, to someone else, in accordance with the best interests (*intérêt*) of the children.<sup>98</sup>

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93. See FR. C. CIV. art. 373.

94. FR. C. CIV. art. 373-1.

95. WEILL & TERRÉ, *supra* note 28, at 752; FR. C. CIV. art. 380.

96. Article 302 of the French Civil Code provided:

The children will be confided to the spouse who has obtained the divorce, unless the tribunal, upon the demand of the family, or of the *ministère public*, and in view of the information gathered in the application of Article 238 paragraph 3, finds the best interests of the child require that all or some of them should be confided to the care of either the other spouse, or of a third party. Author's translation.

97. *Id.*

98. Article 286 of the French Civil Code now provides: "The rights and the obligations of the father and the mother with regard to their children, subsist after divorce, in accordance with the following rules." Author's translation.

Article 287 provides:

In accordance with the interests of the minor children, their custody is confided to one or the other of the spouses. In exceptional cases, and if the interests of the children so require, this custody may be confided to another person chosen preferentially from among relatives, or, if that becomes impossible, to an educational establishment. FR. C. CIV. art. 287. Author's translation.



French courts, even prior to the amendment of these articles, often ignored the legislative mandate to award custody to the person who obtained the divorce. Instead, the courts awarded custody in accordance with the interests of the child. The judiciary ordered special investigations (*enquetes sociales*), conducted by social experts, to help determine the arrangement which would best serve each child.<sup>99</sup> Articles in the new Code explicitly provide the judge with this mechanism. Before the court makes a custody determination, whether provisional or definitive, the judge may call for an investigation to obtain information relating to the material and moral situation of the family, the condition in which the children are living and are being raised, and the measures that each parent would be able to take in the children's best interests. The results of the investigation may be challenged by an interested party and the court may allow a counter-investigation (*contre-enquete*).<sup>100</sup>

Prior to the reforms, the court, in a divorce suit, sometimes held that the spouse at fault did not have the right to challenge the other spouse's right to custody of the child.<sup>101</sup> However, the court usually permitted such a challenge and would hear reasons why an award of custody to the parent technically at fault would best serve the child's interests.<sup>102</sup> French jurisprudence generally held that judges, in determining custody, should decide what would best serve the interests of the children, notwithstanding any belief of either parent as to the child's best interests. The court made such determinations in spite of the former Article 302 requirement awarding custody to the one who obtained the divorce.<sup>103</sup> Today, the terms of Article 287 of the Civil Code clearly indicate legislative approval of the above-mentioned jurisprudence.

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With regard to what is meant by the term "interests of the child," see comments following FR. C. CIV. art. 287 (citing Judgment of Apr. 28, 1976, Trib. gr. inst., Nevers, [1977] D.S. Jur. 326 note Almairac). See also text accompanying notes 255-64 *infra*.

99. See cases and discussion cited in 2 M. PLANIOL & G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* §§ 652-57 (2d ed. 1952) [hereinafter cited as PLANIOL & RIPERT]; 7 C. AUBRY & C. RAU, *DROIT CIVIL FRANÇAIS* § 481, no. 218 (7th ed. 1962) [hereinafter cited as AUBRY & RAU]; 1 A. COLIN & H. CAPITANT, *COURS ELEMENTAIRE DE DROIT CIVIL FRANÇAIS* § 408 (11th ed. Juilloit de LaMorandiere ed. 1947) [hereinafter cited as COLIN & CAPITANT]; 3 MAZEAUD, *LEÇONS DE DROIT CIVIL*, tome 1, no. 1459 (4th ed. 1973) [hereinafter cited as MAZEAUD II]; de Naurois, 56 *REVUE CRITIQUE DE LÉGISLATION ET JURISPRUDENCE* [REV. CRIT. LÉG. ET JUR.] 460 (1936); [1959] Dalloz, *Jurisprudence* [D. Jur.] Chron. 179 note Donnier [hereinafter cited as Donnier].

100. FR. C. CIV. art. 287-1. These social investigations cannot be utilized in any action relating to the cause of the divorce. *Id.*

101. III *ENCYCLOPÉDIE JURIDIQUE DALLOZ* 1, *Divorce*, no. 603. (2d ed. 1970-1976) [hereinafter cited as *ENCYCLOPÉDIE DALLOZ*].

102. *Id.* See, e.g., Judgment of July 23, 1923, Cass. req., [1924] D.P. I 72; Judgment of Feb. 5, 1900, Cour d'appel, Agen, [1900] D.P. II 324.

103. See, e.g., Judgment of Dec. 15, 1896 [1897] D.P. I 421; Judgment of July 11, 1904 [1906] D.P. I 398; Judgment of July 23, 1934, Cass. req., [1934] D.P. I 508; Judgment of Jan. 5, 1938 [1938] D.P. I 131; Judgment of June 9, 1939 [1939] D.P. I 402; Judgment of June 4, 1940 [1940] D.P. I 148; Judgment of May 18, 1943 [1943] *Recueil Analytique, Jurisprudence* [D.A. Jur.] 50.

This Article indicates that the judge has four options with regard to his determination of custody: Custody may be awarded (1) to the father, (2) to the mother, (3) exceptionally, to third persons or (4) exceptionally to educational establishments. Yet, these options had long before been accepted by the jurisprudence.<sup>104</sup> The Court of Cassation (*la cour de cassation*), for example, had consistently determined that the trial judge, in cases of custody, had complete power to consider the issue of the best interests of the child and to award custody on such a basis.<sup>105</sup> The purpose of the legislative changes was to recognize these judicial developments and to facilitate the task of the courts in determining what would best serve the interests of the children in cases of separation or divorce.

Although the primary purpose of the articles governing custody and parental authority is to protect the children, the French Civil Code recognizes that the parents themselves have interests in matters of custody requiring protection. Current Article 286, for example, provides that the rights and obligations of parents with regard to their children subsist in accordance with rules of the Civil Code. Parental authority continues after divorce, but may be revoked, at least temporarily, for the parent who has not been awarded custody.<sup>106</sup> The whole of parental authority, which subsists in the non-custodial parent, may be re-established by court order upon proof of changed circumstances.<sup>107</sup>

### C. *Effects of Separation and Divorce on the Right to Exercise Parental Authority*

Under the former French Civil Code, both parents retained all or whatever part of the parental authority they had held prior to the separation or divorce. Thus, the parent who was at fault for the divorce or separation, and who was thereby deprived of his or her right to custody, would, nevertheless, retain the power to exercise all of the other attributes of his or her authority. Under the

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*See also* other cases cited in *ENCYCLOPÉDIE DALLOZ*, *supra* note 101, at no. 1740.

The judge may take into account any agreements made by the spouses. The court may also consider the wishes expressed by minor children once the judge has determined that the appearance of the children will not harm them. FR. C. CIV. art. 290.

104. *Id. See, e.g.*, Judgment of Mar. 31, 1908, Cass. req., [1908] D.P. I 277; Judgment of July 5, 1909, Cass. req., [1909] D.P. I 496; Judgment of Mar. 22, 1922, Cass. req., [1922] D.P. I 159; Judgment of July 27, 1931, Cass. req., [1931] GAZ. PAL. II 715; Judgment of May 18, 1943, Cass. req., [1943] D.A. Jur. 50.

105. *See* cases cited in note 104 *supra*. *See also* Judgment of June 9, 1857, Cass. req., [1857] D.P. I 402; Judgment of May 11, 1858 [1858] D.P. I 285; Judgment of July 17, 1959 [1960] D.S. Jur., Somm. 17; Judgment of Dec. 15, 1965 [1966] D.S. Jur., Somm. 37; Judgment of Jan. 20, 1967, Cass. civ. 2e, [1967] D.S. Jur. 415; Judgment of Feb. 13, 1973, Cass. civ. 1re, [1973] Bulletin des Arrêts de la Cour de Cassation [Bull. Civ.] I no. 51; Judgment of May 8, 1974, Cass. civ. 1re, [1974] Bull. Civ. I no. 154.

106. FR. C. CIV. arts. 378-381.

107. *Id.*

old system of "paternal power," the father alone had the right to exercise parental authority. Thus, if the prescriptions of the Code prior to 1970 were followed faithfully, the mother may have been awarded custody with the father retaining the exclusive power to make many decisions regarding the child's rearing (*i.e.*, where and how the child would be educated, the methods and the approach to be taken in terms of the moral or religious education of the child, *etc.*).

French jurisprudence did not ignore the problems inherent in such situations. The courts intervened extensively in matters relating to the father's right to exercise paternal power. These incursions went far beyond anything that the Code drafters might have contemplated.<sup>108</sup> The courts sometimes would provide the mother not only with physical custody of the child, but also with the right to determine the education of her children and the power to exercise other rights which, if the Code were followed explicitly, might have remained with the father.<sup>109</sup>

The new law, with its emphasis on spousal equality, provides both parents with the power during their marriage to determine what is in the best interests of the children. The Code provides that the parent who is awarded custody of the children after a divorce or separation will have the right to exercise parental authority with regard to those children.<sup>110</sup> The new Civil Code articles accord the non-custodial spouse the right of visitation and the right of supervision.<sup>111</sup> Although this new system grants the custodial parent the right to exercise parental authority, the non-custodial parent has the right to expect the parent having custody to consult him regarding the child's education. The non-custodial parent has recourse in the courts if he believes the other is not properly caring for the child.<sup>112</sup> Moreover, when the custodial parent dies, parental authority may be renewed in the surviving spouse. Indeed, unless there are strong reasons not to do so, the custody of the child will be re-established in the surviving ex-spouse.<sup>113</sup> The perspective of the Code is that

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108. WEILL & TERRÉ, *supra* note 28, at 723.

109. *Id.*

110. FR. C. CIV. art. 373-2, para. 1.

111. *See* FR. C. CIV. arts. 288, 373-2.

112. WEILL & TERRÉ, *supra* note 28, at 723-24.

113. FR. C. CIV. art. 373-3, para. 1, provides: "Divorce or separation does not prevent the mother or father from acquiring parental authority as provided in art. 373-1, even for that parent who, although having been deprived of the right to custody by a prior judgment, is capable of exercising such authority." Author's translation.

FR. C. CIV. art. 373-1, provides: "If one of the spouses dies or is found to be in one of the situations enumerated by Article 373, the exercise of parental authority devolves in whole to the other." Author's translation.

the child's interests will usually be served best by both a continued relationship with and participation by both parents in his rearing.

Authority for determining custody and the change of custody rests exclusively with a judge sitting as the judge of matrimonial affairs. Of course, the judge may always oppose any automatic succession of rights to the non-custodial parent if he believes it will not be in the child's best interests.<sup>114</sup>

The right to custody includes the rights to fix the child's residence and the right to have the presence of the child in the home. The child's domicile is deemed to be with the person who has been awarded custody.<sup>115</sup> The custodial parent also has the right to supervision of the child, to control the relationships of the child, to direct the child's education, as well as the right to the general control of the child's person.<sup>116</sup>

Civil Code Article 288, as amended in 1975, provides that the spouse to whom physical custody has not been awarded maintains his right to watch over the caring and upbringing of his children. He is to contribute thereto in proportion to his means. The non-custodial parent's rights of visitation and access (*hébergement*) cannot be refused, absent serious grounds.<sup>117</sup>

### 1. The Right of Supervision (*Surveillance*)

Article 288 of the French Civil Code provides that the spouse to whom physical custody has not been confided retains the right of supervision over the child's maintenance and education. Thus, the non-custodial parent may have a significant impact on the conduct, health and education of his children.<sup>118</sup> The term "education," as used in the Civil Code, has two connotations. The first relates to the formal education of the child. In addition, the term refers to the moral and social upbringing. The term includes all that comprises the authority of a parent to educate and raise one's child to become a mature,

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114. WEILL & TERRÉ, *supra* note 28, at 725-26; FR. C. CIV. art. 373-3.

115. FR. C. CIV. art. 108-2.

116. See MAZEAUD II *supra* note 99, at 586; FR. C. CIV., arts. 286, 373-2. See also [1978] D.S. JUR. Chron. 43 note Legeais [hereinafter cited as Legeais].

117. It should also be noted that Article 288 also provides that the court may grant responsibility for the administration of the child's property to the parent who has not been awarded actual custody.

118. MAZEAUD II, *supra* note 99, at 587 n.3. The parent must also contribute to the child's education an amount proportionate to the parent's resources. FR. C. CIV. art. 288. The non-custodial parent does not, of course, retain exclusive power over the conduct, health and education of his children. See Judgment of Feb. 23, 1971, La Chambre de la Famille du Trib. gr. inst., cited in Nerson, *supra* note 67, at 139.

responsible adult.<sup>119</sup> Even if the court awards custody to a third party, both parents continue to oversee the child's education, unless the court rules otherwise.<sup>120</sup>

The right of supervision was analyzed in an important decision by the French Court of Cassation (*court de cassation*) in 1973.<sup>121</sup> The Court of Cassation in that case reversed a decision of an appeals court which had approved the award of custody to the mother, but had maintained in the father the exclusive right to choose the establishment in which the children would be educated. The court explained that the non-custodial parent does not possess exclusive authority with respect to the children's education. The court stated that the right to participate in the matter of the children's education must not be allowed to be transformed into the right to meddle and interfere.<sup>122</sup>

Disputes between custodial and non-custodial parents with regard to the child's rearing and formal education may be resolved in court. A parent who believes that the child's best interests are not being furthered by the conduct of his former spouse may petition the court to determine what is in the best interests of the child. In order to make this determination, the court will apply as a standard the past practices of the parents. If no such guideline exists, the court will decide on its own what would best serve the interests of the child.<sup>123</sup>

Under French law, the decision of a tribunal relating to the custody of a child is not *res judicata*. Rather, such a decision is provisional. Thus, the spouse or spouses not awarded custody, or even the *ministère public*, may, at any time, petition the court to demand a modification of an earlier custody decision. The party bringing the new action must allege that a change of circumstances warrants such a modification.<sup>124</sup> However, change of custody is difficult to obtain because courts consider change, in itself, as inimical to the child's well-being.

119. See generally PLANIOL & RIPERT, *supra* note 99, at § 654; AUBRY & RAU, *supra* note 99, at § 481, no. 221; 3 BEUDANT & LEREBOURS-PIGEONNIÈRE, DROIT INTERNATIONAL PRIVÉ no. 879 (3d ed. 1970); COLIN & CAPITANT, *supra* note 99, at no. 10522; 1 G. RIPERT & J. BOULANGER, TRAITÉ DE DROIT CIVIL § 2278 (1956); MAZEAUD II, *supra* note 99, at no. 1495; 1 G. MARTY & P. RAYNAUD, DROIT CIVIL no. 328 (1956). See also other authorities cited in ENCYCLOPÉDIE DALLOZ, *supra* note 101, at no. 1809. (Article 288 is based on former Article 303.)

120. FR. C. CIV. art. 373-2. It is interesting to note that Article 373-2, paragraph 1, only mentions the right of visitation and supervision. It provides that "if the father and the mother are divorced or judicially separated, parental authority is exercised by the one to whom the tribunal has awarded physical custody of the child, except for the right of visitation and of supervision belonging to the other." Paragraph 2 of Article 373-2 addresses the rights that remain in the mother and the father when custody has been awarded to a third party. See Legeais, *supra* note 116.

121. Nerson, *supra* note 67, at 139.

122. *Id.* at 139.

123. FR. C. CIV. art. 372-1.

124. WEILL & TERRE, *supra* note 28, at 724-25; FR. C. CIV. art. 291. Venue is determined on the basis of where the parent who has been awarded custody resides.

Prior to 1970, French jurisprudence established two separate lines of analysis to determine who should have the right to control the child's education after divorce. The first, represented by an 1866 decision from the *tribunal civil* of Lyon, viewed such right as an attribute of "paternal power," which remained vested in the father, even though custody had been awarded to the mother. The father was allowed to retain the right to make all decisions relating to his children's education, including their moral or religious education. This power was maintained solely on the basis of paternal status. Only through evidence of abuse could the father's prerogative be circumvented.<sup>125</sup>

The opposing line of cases, on the other hand, perceived the right to control the education of one's children as an accessory right to that of physical custody. These decisions held that in case of disagreement or dispute between the father and the mother, the will of the person who had legal custody would prevail. The parent who had been awarded custody was charged with guiding the spiritual and religious development of the child.<sup>126</sup>

Notwithstanding the diverse opinions of the lower courts, the French Court of Cassation has applied what may be described as a "best interests of the child standard" in its determinations relating to the education and rearing of the child. The Court of Cassation has reasoned that the authority to determine the education of the child belongs first to the parent who has been awarded custody over that child. However, judicial decisions relative to the exercise of parental authority may be supplemented or modified upon demand of a spouse, family member, or the *ministère public*.<sup>127</sup> The Court of Cassation has maintained that the judiciary will have ultimate authority to determine what will be in the best interests of the child whenever there is a dispute between parents.

As early as 1857, the court held that the father, although he had not been awarded custody, could exercise his right of supervision over the education of his children, especially with regard to the religious education.<sup>128</sup> In that case, a Protestant mother was awarded custody of her children, who were Catholic, on the condition that the children be raised in the Catholic faith. The court held that if the mother in any way abused or undermined her children's faith, the father had clear recourse in the civil court to obtain not only the reestablishment of the religious training, but even a modification of the judgment of custody. In a 1919 case, a dispute arose between a child's mother, who wanted the child to attend the French Naval Academy, and the child's

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125. See Judgment of Mar. 10, 1866, Trib. pr. inst., Lyon, [1867] D.P. III 96 and other cases, cited in *ENCYCLOPÉDIE DALLOZ*, *supra* note 101, at no. 1833.

126. *Id.* See, e.g., Judgment of Apr. 13, 1937, Cass. civ., [1937] D.P. I 281. See also Judgment of Jan. 6, 1948, Trib. pr. inst., Briançon, [1948] D. Jur. 579 note Carbonnier.

127. This jurisprudential development is now articulated in FR. C. CIV. art. 291.

128. Judgment of June 9, 1857, Cass. civ., [1857] D.P. I 401.

father, who wanted the child to attend St. Cyr, the French military academy. Although the father had custody of the child, the mother was allowed to exercise her right of supervision by challenging the father's right before the court. The court, in turn, based its decision on the best interests of the child.<sup>129</sup> In 1937, the French high court determined that the best interests of a child were not promoted, even where there was no specific dispute, if the custodial spouse denied the non-custodial spouse input into the education of the child.<sup>130</sup>

Thus, the Court of Cassation has, over the years, considered the interests of the children to be best served when both parents continue to participate in the child's education. This view continues today. Indeed, even if the custody of the child has been awarded to a third party, both parents are entitled to continue to exercise their right of control over their child's education unless the court has expressly ruled otherwise.<sup>131</sup>

## 2. The Rights of *Hébergement*, Correspondence and Visitation

The verb *héberger* is defined in the *Dictionary of the French Academy* as "to receive at one's home, to lodge, and to nourish."<sup>132</sup> Civil Code Article 288, paragraph 2, provides the non-custodial parent with the rights of visitation and *hébergement*. These rights can be refused only upon indications of unfitness or other cause for forfeiture as discussed above.

The rights of *hébergement* and visitation are seen by French jurisprudence to include such rights as (1) the right of correspondence, (2) the right of *both* parents to enjoy the presence and the love of their children, even though both may not have the right to continuing custody, and (3) the right to enjoy the presence of one's children during special occasions such as holidays or during the annual vacation. Indeed, when parents take vacations at the same time of year, as is common in France, the courts have required alternating presence of the children.<sup>133</sup>

There is little substantive difference between the right of *hébergement* and that of visitation. The essence of the two rights is that both parents, whether or not they have custody, may nourish and care for their children, at least during certain portions of each year. The Code recognizes that the child requires a relationship with both parents.

The parent who has not been awarded custody also has the right to *correspond* with his or her children without any interference from the other parent.<sup>134</sup> Under the former regime based on paternal power, the father had the right to

129. Judgment of Apr. 14, 1919, Cass. req., [1919] D.P. I 59.

130. Judgment of Apr. 13, 1937, Cass. civ., [1937] D.P. I 281.

131. See FR. C. CIV. arts. 288, 286-295, 373-2.

132. II DICTIONNAIRE DE L'ACADAMIE FRANÇAISE (8th ed. 1935).

133. Judgment of July 3, 1978, Cass. civ. 1re, Versailles, [1979] GAZ. PAL. II, 49.

134. Judgment of June 7, 1899, Cour d'appel, Rouen, [1900] D.P. II 287.

examine correspondence sent to his child by the child's mother, and in the child's best interests, hide from the child certain details of the mother's conduct that the child "ought to be able to ignore."<sup>135</sup> This situation appears to remain possible under current French law.<sup>136</sup>

The right of *visitation* is not defined in the French Civil Code. Essentially, the jurisprudence considers visitation as a right to maintain direct and personal relations with one's child. It is the right to meet, visit with, see or receive one's child. Visitation does not include the right to lodge one's child, as such right is embraced within the notion of *hébergement*.<sup>137</sup>

Just as the right of supervision applies as a matter of law to both parents, including the parent who has not been awarded custody of the child, the right of visitation is established in the Civil Code as a reciprocal right and obligation.<sup>138</sup> It is the obligation of the parent who has been awarded custody of the child to establish, in cooperation with the other parent, the effectuation of this right.<sup>139</sup>

The approach of most judges in France, with regard to visitation and *hébergement*, is to require the parents to agree on the time, place, and frequency of visits and vacations.<sup>140</sup> If the parents fail to agree, the court will apply its sovereign power to determine what the interests of the child dictate.<sup>141</sup> This approach is based on Article 247, paragraph 4, and Article 289 of the French Civil Code. Because the French Civil Code regards the rights of visitation, supervision and correspondence as matters of substantive parental authority, the courts are not reluctant to require divorced parents to work out the arrangements for the exercise of their joint authority. If one parent interferes with the other parent's exercise of these substantive rights,<sup>142</sup> the aggrieved parent can seek judicial enforcement of this obligation or can seek forfeiture, or even damages.<sup>143</sup>

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135. Judgment of July 9, 1913, Cour d'appel, Paris, [1915] D.P. II 54.

136. See ENCYCLOPÉDIE DALLOZ, *supra* note 101, no. 1829.

137. See Guiho, [1952] J.C.P. I 963; [1965] D.S. Jur., Chron. 1 note Guiglaris; [1967] D.S. Jur., Chron. 183 note Falconetti; ENCYCLOPÉDIE DALLOZ, *supra* note 101, at nos. 1814-26.

138. FR. C. CIV. art. 373-2.

139. See, e.g., Judgment of July 24, 1878, Cass. req., [1878] D.P. I 471; Judgment of July 16, 1888, [1889] D.P. I 456; Judgment of Mar. 14, 1938, Cass. civ., [1938] D.P. I 243.

140. See, e.g., Judgment of July 30, 1901, Cour d'appel, Grenoble, [1903] D.P. II 61.

141. See Judgment of Dec. 29, 1924, Cass. req., [1926] S. Jur. I 32; Judgment of Jan. 21, 1925, Cass. civ., [1925] D.P. I 99; Judgment of Oct. 4, 1978, Cass. civ. 2e, [1978] Bull. Civ. I 158. For a United States court decision requiring consent of the non-custodial parent in major decisions regarding the child of the dissolved marriage, see *Van Nortewick v. Van Nortewick*, 87 Ill. App. 2d 55, 230 N.E.2d 391 (1967).

142. At common law, the system of rights and duties arises from the specific fact situation. Thus, the focus is on the specific relationship of the parties, rather than the substantive status of the parties. See POUND, *supra* note 47, at 21; LITVINOFF, *supra* note 63, at 5-6.

143. See FR. C. CIV. arts. 293-295, 300, 371-2, 378-380. But see *Spencer v. Terebello*, 373 So.2d 200 (La. App. 4th Cir. 1979), where a Louisiana court, under similar circumstances, awarded damages for violation of an obligation.



### a. *Forfeiture of These Rights*

Courts can, of course, deny the parents all rights of visitation, *hébergement* or correspondence, just as the courts are empowered to withdraw all parental authority.<sup>144</sup> Under Article 288, paragraph 2, such forfeiture occurs only if there are serious grounds. Jurisprudence prior to the reform had, in fact, adhered to the same practice.<sup>145</sup> Thus, visitation rights have been denied by a court when the father has failed to meet support and educational needs of his children for an extended period of time.<sup>146</sup>

Like all other decisions relating to the exercise of parental authority, those relating to the right of visitation and *hébergement* may be modified at any time by the courts upon the demand of a parent, a member of the family or the *ministère public*.<sup>147</sup> In one case, an abuse of custody was found where a father, who had been awarded custody, emancipated his child in order to eliminate his ex-wife's continuing authority over the child. The judge determined that it was an abuse of the father's right, pursuant to his parental authority and his right to custody as awarded to him by the court, to emancipate his child for this purpose.<sup>148</sup>

144. The court generally has a great deal of flexibility in fashioning a remedy appropriate to the situation. For example, a court may order a newly married non-custodial parent to exercise his right of visitation in the home of a third party. *See, e.g.*, Judgment of Jan. 5, 1938, Cass. req., [1938] D.P. I 131; Judgment of Mar. 17, 1923, Trib. gr. inst., Seine, [1923] D.P. I 9. The court may remove such prohibition of the visit and *hébergement* of one's child in one's new household once the mother or the father marries his or her adulterous paramour. *See, e.g.*, Judgment of Dec. 17, 1964, Cour d'appel, Bordeaux, [1965] D.S. Jur. 144-45 note Savatier. (This case, however, has been severely criticized by Professor Desbois. *See* Desbois, REV. TRIM. DR. CIV. 332 (1965)). Courts have also approved visitation rights conditioned upon the promise of a parent that he or she will not take his or her children outside French territory. *See* Judgment of Jan. 12, 1972, Cass. civ., [1972] D.S. Jur., Somm. 90.

145. *See, e.g.*, Judgment of May 15, 1972; Cass. civ., [1972] D.S. Jur., Somm. 165.

146. Judgment of Apr. 23, 1971, Cass. civ. 2e, [1972] Bull. Civ. II 110. One court of appeal has held that the father must forfeit his right of visitation and *hébergement* if an expert shows that the relationship with the father is traumatizing the child in any way.

147. FR. C. CIV. art. 291. *E.g.*, Judgment of Mar. 23, 1976, Trib. gr. inst., Toulouse, [1976] J.C.P. II 18456 note Lindon.

148. Judgment of Feb. 5, 1957, Trib. gr. inst., Paris, [1957] J.C.P. II 9988 note E.N. The ruling was made on the basis of Article 477. *See* FR. C. CIV. art. 477. The case was decided prior to the Law of Dec. 14, 1964, [1964] Journal Officiel de la République Française [J.O.] 11140, which amended Article 477 so as to make such a practice impossible. The amended law provides:

[T]he minor, even though unmarried, may be emancipated after he has reached the age of sixteen years. This emancipation will be pronounced, if there are just reasons for doing so, by the judge, upon the demand of one or both parents. When the demand is presented by one of the parents alone, the judge will decide, after having heard the other parent, unless the other parent is unable to communicate his wishes.

*Id.* Author's translation.

### b. *Criminal Violations*

The French legal system provides one additional sanction to ensure the cooperation between custodial and non-custodial parents. It is a criminal offense if the custodial parent interferes with the non-custodial parent's right of supervision, visitation or *hébergement*.<sup>149</sup> A custodial parent who refuses to allow the father or the mother of a deceased parent to exercise their proper visitation rights has likewise committed an offense.<sup>150</sup> Reciprocally, if the spouse entitled to visitation or *hébergement* rights acts in a manner inconsistent with the rights of the spouse having custody (i.e., by removing the children from the jurisdiction in an attempt to gain physical custody himself) he or she has violated the law.<sup>151</sup> It is also an offense under Article 357 of the Penal Code for either the custodial or non-custodial parent to exercise any influence detrimental to the authority of the other parent over the child (i.e., encouraging disobedience, refusing to cooperate with the other spouse, or persuading the child to refuse the other spouse his or her right of visitation or *hébergement*).<sup>152</sup>

## D. *Evolution of "The Best Interests of the Child" Standard*

### 1. Initial Evolution

French courts today resolve any dispute regarding parental authority that parents are unable to resolve themselves. In making a resolution the courts use "the best interests of the child" standard. This approach evolved over several centuries. In ancient Roman and French written law, family relationships were dominated by the head of the family, namely, the father. Family law was an amalgamation of rights and powers conferred on the head of the family to allow him to protect his family. According to at least one authority, this arrangement was essentially political.<sup>153</sup> The authoritarian system then in power conceived of familial relations as a means of protecting the social cell that was the embryo of the village, the town, the city and the state. The family was the backbone of the political structure and reflected and promoted authoritarianism. Nevertheless, at certain times and on certain subjects, the system accommodated reform for the protection of children. The Digest of the French Civil Code promulgated the famous maxim: *infans conceptus pro nato habetur*. Indeed,

149. FR. C. CIV. art. 372-2, para. 2. See also Judgment of Oct. 19, 1935, Cass. crim., [1937] D.P. I 12 note Lebrun; Judgment of Oct. 27, 1928, Trib. gr. inst., St. Quentin, [1928] D.P. II 602.

150. Judgment of Dec. 30, 1933, Cour d'appel, Angers, [1934] D.P. II 57 note Lebrun.

151. Compare Judgment of Nov. 6, 1936, Cass. crim., [1936] D.P. I 5, with *Spencer v. Terebello*, 373 So.2d 200 (La. App. 4th Cir. 1979).

152. Judgment of Dec. 27, 1951, Cass. crim., [1952] D. Jur. 107.

153. See Donnier, *supra* note 99.

from the beginning, the Civil Code and the laws that followed incorporated the term "benefit of the children" (*avantage des enfants*) as the standard for courts to use in resolving certain custody problems. For example, Article 302 of the original Civil Code, relating to the award of custody to one of the parents after divorce, utilized this terminology.<sup>154</sup> However, until reforms were adopted beginning in 1965, this approach was exceptional; rather, family law under the Civil Code generally consisted of a set of rights accorded to the father in order to protect the cohesiveness of his family.

## 2. Maternal Preference

After the decline of paternal preference in matters of custody after divorce, the courts usually awarded custody to the mother. Although French legislation has never had an express "maternal preference" rule, the general practice of the courts has been to award custody to the mother after divorce proceedings.<sup>155</sup> Article 302 required a judge to award custody to the spouse who was not at fault. Nevertheless, the Article also provided that the court could award the child to the offending spouse or to a third person if the court found such an award to best serve the interests of the child. As the mother-child relationship became increasingly important during the 19th century, maternal custody was increasingly thought to be in the child's best interests. Accordingly, courts used the language of Article 309 to award custody to mothers in most cases.<sup>156</sup> This "maternal preference" has continued throughout much of the 20th century.<sup>157</sup> Statistics show that since the reform, French courts have awarded custody to the mother in 83% of the cases. Prior to the reform, the courts awarded custody to the mother in 60% of the cases, including cases in which the court found the mother to have been at fault for the divorce. New Article 287 of the French Civil Code eliminates any mention of the notion of fault as a criterion in custodial awards, and provides that the judge must make his determination exclusively on the basis of the interests of the child.<sup>158</sup> It appears that the jurisprudence continues for the most part to place custody in the mother, although the awards never have been automatic.

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154. *Id.* See FR. C. CIV. art. 302.

155. Notwithstanding the de facto maternal preference that developed, the concept of "paternal power" continued to have an impact under the Code, as the father maintained his power of control over the children, even when the court did not award custody to him. ENCYCLOPÉDIE DALLOZ, *supra* note 101, at nos. 1682-84. See, e.g., Judgment of Aug. 3, 1949, Cass. civ. 2e, [1950] J.C.P. II no. 5473; Judgment of Jan. 30, 1952 [1952] Bull. Civ. I 36. *But see* Judgment of July 5, 1957, Cass. civ., [1957] D. Jur. 640; J. CARBONNIER, DROIT CIVIL 217 (10th ed. 1977).

156. Massip, *La Réforme du Divorce*, REP. NO. 1975.1 at § 202 n.290, *cited in* Audit, *Recent Revisions of the French Civil Code*, 38 LA L. REV. 747, 774 (1978).

157. See, e.g., ENCYCLOPÉDIE DALLOZ, *supra* note 101, at nos. 1682-84; Judgment of Aug. 3, 1949, Cass. civ. 2e, [1950] J.C.P. II 5473; Judgment of Jan. 30, 1952 [1952] Bull. Civ. I 36. *Contra*, Judgment of July 5, 1957, Cass. civ., [1957] D. Jur. 640.

158. FR. C. CIV. art. 287. Article 287 provides:

a. *Exceptions to the "Maternal Preference" Rule*

It is not difficult to find representative examples of the 17% of the cases in which courts awarded custody to the father. The court has considered the "conscientious, solid, and responsible character of the father, as opposed to the irresponsibility of the mother, with regard to the children" as the basis for the decision.<sup>159</sup> In one case, a Parisian mother, having lost custody due to her instability, argued that the court should allow her to regain custody because she had remarried and her life had become stable. The court denied her petition, stating that the father was a competent and affectionate parent, and that he presented his children with all of the guarantees of a good education and a secure future.<sup>160</sup>

In principle, the courts in France consider the moral protection of the child as more important than the material protection of the child, as long as there is a modicum of material well-being afforded by the parent who will provide the greater moral protection. However, a Parisian court in 1959 held that, although the mother was worthy in every way, her two young daughters ought to be awarded to the father, pending divorce proceedings. The court reasoned that the father was in a better material position to provide for the support and education of the children.<sup>161</sup> The court explained that as long as the financially more secure parent will not present a moral danger to the child, it may be preferable to award custody to that parent. In another case, the court found that the professional occupation of a mother did not permit her to devote enough time to her six children, and held that it was in the interests of the children to award custody to the father, who was "capable in every respect, with regard to their education and support."<sup>162</sup>

The discretion of the court is sovereign in determining the interests of the children. In applying this discretion, the court may promote any sort of arrangement that will best serve such interests. In several cases, the court has awarded custody to the father on the condition that the paternal grandparents house the children.<sup>163</sup> Courts have awarded custody to the father on the condition that whenever he leaves France he will allow the paternal grandfather to

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In accordance with the interests of the minor children, their custody is confided to one or the other of the spouses. In exceptional circumstances and if the interests of the children so require, this custody may be accorded, either to another person chosen preferably from among their relatives, or, if the above is impossible, to an establishment of education.

Author's translation.

159. Judgment of Feb. 10, 1971, Cass. civ. 2e, [1971] D.S. Jur., Somm. 127.

160. Judgment of Dec. 15, 1965, Cass. civ., [1966] D.S. Jur., Somm. 37. *But see* Judgment of Oct. 20, 1965, Cass. civ. 1re, [1965] J.C.P. II No. 14444.

161. Judgment of Jan. 30, 1959, Cour d'appel, Paris, [1959] D.S. Jur. 97, Somm. 65.

162. Judgment of Feb. 17, 1967, Trib. gr. inst., Seine, [1967] GAZ. PAL. II 202.

163. Judgment of Dec. 15, 1965, Cass. civ. 2e, [1966] Bull. Civ. II 546. *See also* [1966] Bull. Civ. II 606.

exercise the equivalent of paternal authority.<sup>164</sup> The judge might award custody to the father if the judge trusts the second spouse of the father, but distrusts the second spouse of the mother. If the judge fears that the child of the first marriage will be neglected among the children of the second marriage of the mother, he also might award custody to the father.<sup>165</sup>

Although the courts award the mother custody in 83% of all cases, the fathers, according to some observers, are satisfied with the decisions.<sup>166</sup> The men "understand" that the judicial practice is founded in reason and on the fact that maternal custody is the "most sensible solution."<sup>167</sup>

#### b. Operation of the "Maternal Preference" Rule

The decisions awarding custody to the mother are predictable. Generally, if the mother can demonstrate to the court that she is competent and responsible, and if the children are of a "tender age," the courts will grant custody to the mother. If at least one of several children is young enough to require the care of the mother, the court often finds it to be in the children's interest to keep them together in "a normal family" with the mother.<sup>168</sup> The *tribunal de grande instance* of Nevers made a prototype decision in 1976. After the 1975 divorce of the parents, the court awarded custody of the minor daughter of the marriage to the mother while custody of two older sons was awarded to the father. Subsequently, the eldest of these sons left the father's home to go live with his mother. The mother then brought an action for the modification of the custody award. The court was confronted with the following questions: (1) whether or not the *de facto* custody of the eldest son, now with the mother, ought to be legitimized under the law; and (2) whether or not the younger son, who was still with the father, ought to be required to live with the mother in order to remain close to his brother. The judges answered both of these questions in the affirmative on the basis of information received from the social investigation.<sup>169</sup>

Custody is not automatically denied the mother if she lives with a man to whom she is not married.<sup>170</sup> Often in such cases, custody will be awarded to the mother on the condition that she marry.<sup>171</sup> If the mother continually

164. Judgment of May 3, 1972, Cass. civ., [1972] Bull. Civ. I 107.

165. ENCYCLOPÉDIE DALLOZ, *supra* note 101, at no. 1741.

166. M.A. GLENDON, FRENCH DIVORCE REFORM LAW OF 1976 24, 199, 222 (1976).

167. [1975] D.S. Jur. Chron. 115-22 note Carbonnier.

168. Judgment of Dec. 20, 1972, Cass. civ. 2e, [1972] Bull. Civ. II 271; Judgment of July 9, 1975, Cass. civ. 2e, [1975] J.C.P. IV 288.

169. Judgment of Apr. 28, 1976, Trib. gr. inst., Nevers, [1977] D.S. Jur. 326 note Almairac.

170. Judgment of July 12, 1966, Cass. civ. 2e, [1966] Bull. Civ. II 545; Judgment of Jan. 30, 1952 [1952] Bull. Civ. I 36; Judgment of July 17, 1959 [1960] D.S. Jur., Somm. 17.

171. Judgment of Jan. 20, 1967, Cass. civ., [1967] D.S. Jur. 415.

engages in questionable conduct or is seen as presenting a moral danger to the child, she will not be awarded custody.<sup>172</sup>

### 3. Emergence of "The Best Interests of the Child" Standard

Thus, the courts look to the existing relationship between the parent and the child in order to determine what will best serve the child's interests. For example, custody has been awarded to the mother upon a showing that the father was frequently called out of France by his work; it has been awarded to the mother when she has organized her professional life around her children's schedule in order to allow her to keep a close watch over the children's health, education, work and leisure, thus allowing her to maintain a "happy" relationship with them.<sup>173</sup>

Professor Almaïric, in a note for a decision from the *tribunal de grande instance* of Nevers, discussed the judiciary's attempt to define what constitutes the best interests of the child.<sup>174</sup> He indicated that the notion of "interest" (*intérêt*) is closely related to that of "attachment, beneficence, solicitude," and is "a sentiment that causes us to find all that is necessary, utilitarian, or agreeable." The professor observed that the notion is so inclusive that perhaps no factors could be categorically ruled out. Professor Almaïric suggests that the following elements ought to be taken into consideration in order to determine what will best serve the interests of the children: the courts generally consider the age, sex and physical needs of the child; the moral, intellectual and religious needs of the child; the situation with regard to the moral and material well-being of the parents; the educational background of the parents; and their ability to respond to the child's needs. The courts are heavily influenced by the respective parents' availability and inclinations with respect to the child's everyday rearing and general education.<sup>175</sup> For example, in 1967, a Paris court awarded custody to the mother, at least in part, because the father's profession required frequent business trips.<sup>176</sup> Thus, at least with regard to the physical custody of the child, French courts appear to make their determinations on a case-by-case basis in a manner similar to that of courts in the United States.<sup>177</sup> In at least 80% of the cases the French courts take a short cut by determining that it is in the interests of the child to be in the custody of his mother. The effect of these

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172. Judgment of Jan. 29, 1970, Cass. Civ. 2e, [1970] Bull. Civ. I 31.

173. Judgment of Jan. 3, 1969, Cass. civ. 2e, [1969] Bull. Civ. I 3.

174. See note 169 *supra*.

175. *Id. See, e.g.*, Judgment of Feb. 10, 1971, Cass. civ. 2e, [1971] Bull. Civ. II 34; Judgment of July 3, 1974, Cass. civ., [1974] Bull. Civ. II 179; Judgment of Nov. 14, 1973, Cass. civ., [1973] Bull. Civ. II 234; Judgment of Jan. 3, 1969, Cass. Civ. 2e, [1969] Bull. Civ. II 3.

176. Judgment of Feb. 7, 1967, Trib. gr. inst., Seine, [1967] GAZ. PAL. II 202. See note 169 *supra*.

177. See Judgment of Dec. 11, 1964, Cass. civ. 1re, [1965] J.C.P. II No. 14155.

decisions is tempered more so in France than in the United States, by the fact that the non-custodial parent retains a significant amount of authority.

Article 290 of the French Civil Code now requires that a judge consider the following items: (1) agreements made by the spouses; (2) information obtained from the social investigation as well as from the counter-investigation; and (3) the feelings and expressed interests or preferences of the child, as long as the appearance of the child is necessary and will not present any difficulties for him. Article 290 does not prescribe any limitation with respect to the age after which a child may be heard concerning his preferences. In practice, the social assistant of the court, during the investigation, will discuss the matter with the child and recommend whether or not the court ought to consider that child's preference. The Code does not require the judge to follow the recommendation of the social investigator or the preferences of the child.<sup>178</sup>

#### 4. Modification of Custody: The "Double Burden" Rule

According to Professor Almailric, courts worry that a change of custody may result in trauma and insecurity. For this reason courts have established the requirement that there may be no intervention by the judiciary to change custody of children except in certain limited situations. Courts often impose a double condition upon the person attempting to modify custody. First, serious events must have taken place in one or the other of the two homes since the decision of the court awarding custody. Second, these events must be of such an importance that they are susceptible of having detrimental repercussions on the well-being of the child; such repercussions must be prejudicial to the child's equilibrium or to his normal development. Both of these requirements must be met for custody to be changed.<sup>179</sup>

Professor Donnier explains that the jurisprudence considers stability and peace of mind of the child as major factors in the question of custody. Courts are careful not to allow the child to become a pawn in the power struggle between parents. For example, in 1912, the Court of Cassation refused to allow the parents to regain custody over their child from a foster family to whom the Social Services Office for Children had awarded custody. The court rendered this decision despite the fact that the parents had retained their parental authority.<sup>180</sup>

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178. See note 169 *supra*.

179. J. CARBONNIER, *DROIT CIVIL* 217 (10th ed. 1977).

180. Gaudemet, 11 *REV. TRIM. DR. CIV.* 160 (1912). A similar notion was expressed by the Louisiana Supreme Court in dicta in *Wood v. Beard*, 290 So.2d 675 (La. 1974), and by Justice Tate in *Paul v. Peniston*, 235 La. 579, 105 So.2d 228 (1958), that if the parents forfeited their authority or right to custody, the court may place the child, or allow the child to remain in the custody of a third party. This same notion was expressed in the famous affair of *Elizabeth Irr* in Paris, March 19, 1959. It represents, perhaps, an early understanding of the notion of the term

In the famous *Irr* case, the court denied a father's request that he regain custody over his daughter who had lived twelve years in a caring and affectionate home.<sup>181</sup> Thus, the French courts have developed a notion similar to what is considered the "double burden" rule in Louisiana.<sup>182</sup> This rule places a very high burden on the part of parents or others who wish to change custody, to show that the child's best interests are not being served in their current home and would be better served in the home of the parents seeking to change custody.

#### IV. LOUISIANA LAW RELATING TO CHILD CUSTODY AND PARENTAL AUTHORITY

##### A. *Custody Incidental to Parental Authority*

One of the basic notions of Louisiana law relating to persons is that many rights and obligations are established by and depend upon one's status as spouse, parent or child.<sup>183</sup> One of the most significant relationships is that between parent and child. Louisiana Civil Code Article 216 provides that during the ongoing marriage, the child, until his majority or emancipation, remains under the authority of his father and mother.<sup>184</sup> Under this Article, the father and mother have the right to *custody* of their children; they have the right to supervise and direct the care of their children and to ensure their children's proper rearing, development, health and safety.<sup>185</sup>

Article 216 also provides that if a dispute arises over the care or rearing of a child, the father's will prevails.<sup>186</sup> This language appears to indicate that if the parents physically separate for some reason and if they both want to have custody of the children, the father prevails and retains custody. However, the Louisiana Supreme Court in *Stelly v. Montgomery*<sup>187</sup> held that the mother could prevail and obtain custody of her children in a habeas corpus proceeding during the ongoing marriage.

In the *Stelly* case, the father argued that his wife's suit against him was barred by immunity. As authority, he cited Title 9 of the Louisiana Revised

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"psychological parent" used by J. GOLDSTEIN, A. FREUD & A. SOLNIT, in *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979) [hereinafter cited as GOLDSTEIN, FREUD & SOLNIT].

181. Judgment of Mar. 19, 1959, Cour d'appel, Paris, [1959] J.C.P. II No. 1155.

182. R. PASCAL, *LOUISIANA FAMILY LAW COURSE* (2d ed. 1979) at 206-207.

183. See LA. CIV. CODE arts. 24-27.

184. LA. CIV. CODE art. 216. This Article provides: "A child remains under the authority of his father and mother until his majority or emancipation. In case of difference between the parents, the authority of the father prevails." *Id.*

185. See R. PASCAL & K. SPAHT, *LOUISIANA FAMILY LAW*, 359 (2d ed. 1979) [hereinafter cited as PASCAL & SPAHT].

186. LA. CIV. CODE art. 216. The French Digest proposed a similar solution, but this was rejected in the reforms of the Civil Code. See notes 90-98 and accompanying text *supra*.

187. *Stelly v. Montgomery*, 347 So.2d 1145 (La. 1977).



Statutes, section 291<sup>188</sup> which, in 1977, proscribed suits between husband and wife, except in actions for divorce, separation from bed and board, separation of property and restitution of paraphernal property. However, the court reasoned that the statute did not proscribe habeas corpus actions. Thus, the language of Civil Code Article 216 and Revised Statute 9:291 notwithstanding, the Supreme Court of Louisiana awarded custody to the mother. In 1979, the Legislature amended Revised Statute 9:291 to include "causes of action pertaining to custody of a child" as one of the exceptions to the prohibition against suit by non-judicially separated husbands and wives.<sup>189</sup>

Even before *Stelly v. Montgomery* and the revision of Revised Statute 9:291, the State in its role as *parens patriae* could institute a public proceeding pursuant to juvenile or criminal legislation if the parent(s) neglected, abandoned or contributed to the child's delinquency. However, such a proceeding took place pursuant to public, not private, law and was designed to be determined in a public forum.<sup>190</sup>

Parental authority is a primary substantive right in Louisiana. This right includes the right of parents to have custody of their children. The legislative

188. Before its amendment in 1978 and 1979, LA. REV. STAT. ANN. § 9:291 provided:

As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband, except for:

- (1) A separation of property;
- (2) The restitution and enjoyment of her paraphernal property;
- (3) A separation from bed and board; or
- (4) A divorce.

LA. REV. STAT. ANN. § 9:291 (West 1961) (amended 1978 & 1979).

As amended in 1978 LA. REV. STAT. ANN. 9:291 provided:

As long as the marriage continues and the spouses are not separated judicially, husband and wife may not sue each other, except for:

- (1) Enforcement of a lawful conventional obligation;
- (2) A loss sustained as a result of fraud or bad faith in the administration of the community property by the other spouse;
- (3) Avoidance of an unauthorized alienation, encumbrance of lease of community property;
- (4) Judicial authorization to act without the consent of the other spouse;
- (5) A separation of property;
- (6) A separation from bed and board;
- (7) A divorce; or
- (8) Restitution of separate property.

LA. REV. STAT. ANN. § 9:291 (West 1978) (amended 1979).

189. LA. REV. STAT. ANN. § 9:291 as amended in 1979 provides:

Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.

LA. REV. STAT. ANN. § 9:291 (West 1979).

190. See LA. CODE JUV. PRO. arts. 403-407; LA. REV. STAT. ANN. §§ 14:74-75.2 (West). See also *Griffith v. Roy*, 263 La. 712, 269 So.2d 217 (1972).

basis for this right stems from a combination of articles in the Civil Code which establish the rights and obligations between parent and child.<sup>191</sup> These articles clearly establish parental authority in the father and mother over children during the ongoing marriage. For example, Article 227 of the Louisiana Civil Code requires parents to maintain, support and educate their children.<sup>192</sup>

A parent who has the right to exercise parental authority but who is without custody for some reason may seek to establish his parental right and regain custody of his child by bringing a habeas corpus action.<sup>193</sup> Theoretically, however, no non-parent has a right under the private substantive law to claim the custody of an unemancipated minor so long as one of the parents retains his or her parental authority.<sup>194</sup> There are exceptions to this rule. The exceptions include: (1) an adoption agency to whom the child has been surrendered for adoption; (2) a would-be adoptive parent of a child not surrendered, with the consent of the parents, after an interlocutory decree of adoption by a competent court; and (3) a person given custody of the child by a judgment of a juvenile court after the child has been found to be delinquent, neglected or abandoned.<sup>195</sup>

#### B. *Right of Biological Parent to Custody*

The rights and responsibilities relating to the parent-child relationship are carefully established and controlled by the Civil Code.<sup>196</sup> Many such rights and responsibilities turn on one's status as spouse, parent or child. Thus, the Louisiana Civil Code accords the children of a valid marriage different rights

191. See, e.g., LA. CIV. CODE arts. 216-218, 220, 235, 237, which provide for the authority which parents can exercise over their children. Cases recognizing such a primary right include: *Paul v. Peniston*, 235 La. 579, 105 So.2d 228 (1958); *Wood v. Beard*, 290 So.2d 675 (La. 1974); *Stuckey v. Stuckey*, 276 So.2d 408 (La. App. 2d Cir. 1973); *Lulich v. Lulich*, 361 So.2d 451 (La. App. 4th Cir. 1978); *Snell v. Snell*, 361 So.2d 936 (La. App. 2d Cir. 1978); *Neal v. White*, 362 So.2d 1148 (La. App. 2d Cir. 1978); *Crepple v. Thornton*, 230 So.2d 644 (La. App. 4th Cir. 1970). Similar rights are recognized in most other states. See, e.g., *In re Hampton's Estate*, 55 Cal. App. 2d 543, 131 P.2d 565 (1942); *Roche v. Roche*, 25 Cal.2d 141, 152 P.2d 999 (1944); *Shea v. Shea*, 100 Cal. App. 60, 223 P.2d 32 (1950); *Raymond v. Cotner*, 75 Neb. 158, 120 N.W.2d 892 (1963); *In re Mathers*, 371 Mich. 516, 124 N.W.2d 878 (1963); *In re Jewish Child Care Assn.*, 5 N.Y.2d 222, 156 N.E.2d 700 (1959). See also Warburg, *supra* note 47, at 481 n.5. See generally Comment, *Louisiana Child Custody Disputes Between Parents and Non-Parents*, 25 LOYOLA L. REV. 71 (1979) [hereinafter cited as Comment, *Custody Disputes*]. See also notes 1-47 and accompanying text *supra*, for a discussion of the philosophical, historical and conceptual background of this principle.

192. See generally PASCAL & SPAHT, *supra* note 185; Comment, *Custody Disputes*, *supra* note 191.

193. See LA. CODE CIV. PRO., arts. 3821-3831.

194. French substantive private law, however, provides for removal of parental custody or its forfeiture in actions brought by third parties or the attorney general (apparently in his *patraie* role).

195. PASCAL & SPAHT, *supra* note 185. See also LA. REV. STAT. 9:404, 407, 422.1 & 429.

196. See, e.g., LA. CIV. CODE arts. 227, 246, 256.

than it accords offspring born outside the traditional marriage relationship. Differences in rights also arise according to whether or not the traditional marriage is ongoing. The regime of parental authority obtains for parents and children in the traditional valid marriage under Louisiana law,<sup>197</sup> while the regime of tutorship (guardianship) obtains for parents and children after dissolution of the traditional marriage; such a regime also obtains where the child is illegitimate.<sup>198</sup>

The right to custody is considered to be inherent in parental authority. If parental authority does not exist, as in the case of illegitimate children, the regime of tutorship arises. All disputes with respect to custody in the regime of tutorship are settled by reference to the Code.<sup>199</sup> An unemancipated minor is placed as a matter of law under the tutorship of the surviving parent after the death of the other.<sup>200</sup> If the mother and father of an illegitimate child have acknowledged that child, the judge shall appoint as tutor the one who will better serve the best interests of the child.<sup>201</sup> If the father has not acknowledged the child, or if the father has acknowledged the child without the mother's concurrence, the mother of the child is, as a matter of law, his tutrix.<sup>202</sup> Upon the death of the non-concurring mother, however, the father of the acknowledged illegitimate child becomes that child's tutor, as a matter of law.<sup>203</sup> Moreover, since the 1979-1980 legislative session, there are no impediments to acknowledgement,<sup>204</sup> rendering all biological parents capable of being tutors of their children.

The tutor has the right to custody of the minor's person<sup>205</sup> as well as the obligation to rear the child properly. Rights and duties between tutors and pupils in a tutorship are generally the same as those between parents and children under parental authority.

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197. See, e.g., articles cited in note 191 *supra*. Compare these articles, cited in *id.*, with LA CIV. CODE art. 256.

198. LA. CIV. CODE art. 256. In Louisiana, parental authority ends with the judicial separation of spouses or the dissolution of a marriage. Such authority never arises if the child is illegitimate. However, the regime of *tutorship* arises as a matter of law. Compare this with French law, wherein parental authority applies to parents and children after dissolution of marriage, as well as to illegitimate children and their parents. See notes 77-82 and accompanying text *supra*.

199. LA. CIV. CODE art. 256.

200. LA. CIV. CODE art. 250.

201. LA. CIV. CODE art. 256.

202. *Id.* The term "of right" used in Article 256 is taken from the French "*de droit*," which actually means "as a matter of law."

203. *Id.*

204. LA. CIV. CODE art. 204 was repealed in 1979.

205. See LA. CIV. CODE art. 246. *E.g.*, *Neal v. White*, 362 So.2d 1148 (La. App. 2d Cir. 1978).

Thus, the natural parent whether under parental authority or under the regime of tutorship, is considered to have rights superior to the rights of a third party in a custody dispute. In *Neal v. White*,<sup>206</sup> the Second Circuit Court of Appeals, in dictum, substantiated the right of the biological parent to have custody in a case in which the alleged natural father appealed the district court's award of custody to the child's biological mother. The alleged father had been in *de facto* custody of the child and had sought in a writ of habeas corpus to obtain legal custody. The district court awarded custody to the mother, because the plaintiff failed to prove he was the father of the child. The court of appeals reversed the lower court and applied "the best interests of the child" test. Although the mother's right was considered superior to the rights of third persons, and although the father had not proved to a legal certainty that he was the child's father, the State's rights were paramount. The State could deprive the biological parent of custody whenever "the physical, mental, and moral welfare of the child require[d] it."<sup>207</sup> The court found that where the alleged father had cared for and had had physical custody of the child since the child was six-weeks old (the child was four years old at the time of the hearing), and the mother had had minimal contacts with the child, the mother had "forfeited" her "superior right" even as against third persons. The court apparently believed that the mother only wanted the child back to secure welfare benefits. Thus, the court applied "the best interests of the child" test after it determined that the mother had forfeited her superior right. Custody, accordingly, was awarded to the putative father.

### C. Problems Relating to Custody Disputes Between Parents and Non-Parents

Parents and tutors have a superior right to the custody of their children and pupils.<sup>208</sup> However, their control over their children or pupils is not absolute. Louisiana district courts have refused to award custody to parents who have proved the existence of their parental authority, but who have neglected or abandoned the child. Such decisions have been based on the best interests and welfare of the child.

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206. *Neal v. White*, 362 So.2d 1148 (La. App. 2d Cir. 1978).

207. *Id.* at 1149. See also *Creppe v. Thornton*, 230 So.2d 644 (La. App. 4th Cir. 1970).

208. This is suggested by a close reading of LA. CIV. CODE arts. 216-218, 220, 227, 229, 235, 237, 246, 250, 256-257, 318, wherein the authority, obligation, and responsibility of parents with regard to their children is established. See also cases cited in note 191 *supra*. Other common law cases which indicate a presumption in favor of the biological parent include, *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973); *Forrester v. Livingston*, 216 Ga. 798, 120 S.E.2d 174 (1961); *Melroy v. Keiser*, 123 Kan. 513, 255 P.978 (1927); *Ex parte Bryant*, 106 Or. 359, 210 P. 454 (1922), cited in Mnookin, *supra* note 46, at 240 n.65.

### 1. "The Best Interests of the Child" Standard

In *State ex rel. Paul v. Peniston*<sup>209</sup> the court held that although the mother and father were fit to have custody of their child, the best interests of the child would be served if the child remained in the custody of her aunt and uncle, who had maintained *de facto* custody over a prolonged period of time. In a concurring opinion, Justice Tate stated that the better reason for giving custody to the aunt and uncle was that the child's parents had forfeited their rights to custody.<sup>210</sup> Similarly, the court in *Wood v. Beard*<sup>211</sup> suggested, in dicta, that a district court in a habeas corpus proceeding may award custody to a non-parent on two conditions: the award would have to be in the child's best interests, and the parent would have to be unsuitable, unfit or otherwise unable to care for the child. However, the court qualified this observation by holding that a dispute between a child's parents and grandparents should not be resolved by balancing the parents' and grandparents' respective abilities with regard to care for the child. Such a resolution would not serve the best interests of the child.<sup>212</sup>

Thus, in spite of the fact that the Civil Code's only two articles relating to custody disputes<sup>213</sup> address interspousal disputes, courts have applied "the best interests of the child" standard to disputes between parents and non-parents. This jurisprudential development is similar to the developments in France, prior to the 1970 amendments to the Civil Code.<sup>214</sup>

### 2. Permanent and Temporary Custody

Notwithstanding this last factor, the primacy of the parental right to custody has led the jurisprudence to establish a *presumption* that it is in the best interests of the child to place custody in the biological parent. Louisiana courts, like French courts, favor parents over non-parents. The presumption is overcome by proving unfitness, unsuitability or inability to care for the child. Thus, in recent years, courts have approved the removal of custody from biological parents and, conversely, the retention of custody by psychological parents, when the former have forfeited their custodial rights. Barring proof of

209. 235 La. 579, 105 So.2d 228 (1958).

210. *Id.* at 232.

211. 290 So.2d 675 (La. 1974).

212. *Id.* at 677. It is interesting to note that even at common law, and it appears in Louisiana specifically, that habeas corpus actions were not originally designed to determine custody, but to relieve a child from illegal restraint. *See* R. HURD, WRIT OF HABEAS CORPUS 458 (2d ed. 1876). In practice, however, early American court decisions were similar to those recently decided by Louisiana courts. *See, e.g.,* *State v. King*, 1 Ga. Dec. 93 (1841), *cited in Constitution & Family, supra* note 43, at 1223 n.157.

213. LA. CIV. CODE arts. 146, 157.

214. *See* notes 87-105 and accompanying text *supra*.

forfeiture, unsuitability, unfitness or inability, "the best interests of the child" standard is fulfilled by placing custody in the parent with legal authority for custody.

Thus, the Louisiana jurisprudence has approved, without a clear legislative basis, the notion that a district court may award custody to a non-parent over a parent.<sup>215</sup> The Louisiana legal structure under the Civil Code does not provide for removal or forfeiture of custody through private actions in the private civil courts if legal authority for custody exists. Technically, it is up to the state, in a public forum, to make such a determination on the basis of standards determined by public law.<sup>216</sup>

Nevertheless, in *Stuckey v. Stuckey*,<sup>217</sup> the Second Circuit, following the lead of the Louisiana Supreme Court in *Paul v. Peniston* and *Wood v. Beard*, awarded custody *pendente lite* to a child's grandparents who had *de facto* custody. The court denied the mother's efforts to regain custody, stating that the mother was unfit at the time to have custody of her child. The Second Circuit panel noted that the decision entailed only a temporary custody determination. The court thus distinguished *Stuckey* from *Griffith v. Roy*, a case in which the Louisiana Supreme Court had held that it was not appropriate for a civil district court to remove custody from a parent to place it in a third party in an action for neglect.<sup>218</sup> Thus, the Second Circuit Court of Appeals held that a mother, if found to be unfit, could be deprived by the district court of her right to temporary custody.

This distinction was also the focus of a 1977 Second Circuit decision, *Hall v. Hall*,<sup>219</sup> in which the court reversed the trial court's decision to award permanent custody to the grandparents, in the best interests of the child. In *Hall*, a custody dispute had arisen between two parents. The grandparents were not parties to the action and the disputing parents had not requested that the trial

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215. *Paul v. Peniston*, 235 La. 579, 105 So.2d 228 (1958). See also *Wood v. Beard*, 290 So.2d 675 (La. 1974) (dictum). But see *Griffith v. Roy*, 263 La. 712, 269 So.2d 217 (1972), wherein the Louisiana Supreme Court held that a suit to take custody of a minor away from a person who under private substantive law was entitled to custody, could only be brought in a juvenile court as a public action, by public authority and under public law, based upon the allegation that the child had been abandoned, neglected or delinquent. *Id.*

216. *Id.*

217. *Stuckey v. Stuckey*, 276 So.2d 408 (La. App. 2d Cir. 1973). In this case the mother of a child sought to regain temporary custody of her child from the child's grandparents; the appellate court held that the trial judge had not abused his discretion in awarding *pendente lite* custody to the grandparents, based upon his belief that the evidence indicated that the mother was unfit to have custody at that time. The court stated that the trial judge "acted solely in regard to what he believe[d] . . . [to be] in the best interest of the child. . . ." *Id.* at 411.

218. 263 La. 712, 269 So.2d 217 (1972). *Griffith* was further distinguished on the spurious ground that the action was filed by the grandparents, whereas in *Stuckey*, the grandparents were not before the court at all.

219. 367 So.2d 162 (La. App. 2d Cir. 1979).

court award custody to the grandparents. In reversing the lower court's judgment, the court of appeals distinguished the temporary custody situation of the *Stuckey* case and held, significantly, that "the best interests of the child" standard in Civil Code Article 157 contemplated only disputes between spouses.

The distinction between temporary and permanent custody made by the Second Circuit in *Hall* and *Stuckey* appears spurious.<sup>220</sup> The court in *Hall* based its decision to award custody to the mother on the fact that the mother was not unfit and had not forfeited her right to custody. The fact that the custody would be permanent rather than temporary was not a deciding factor. Conversely, the basis of the decision in *Stuckey* was not that the custody would be temporary but that the mother was unfit.<sup>221</sup>

### 3. Forfeiture of Custody

One must focus on the notion of forfeiture in order to better understand Louisiana law today. The cases of *Hall v. Hall*,<sup>222</sup> *Wood v. Beard*<sup>223</sup> and *Paul v. Peniston*,<sup>224</sup> signify a trend toward recognizing parental forfeiture of the right to custody. Today, the courts may find it in the best interest of a child to award custody to a non-parent. A court may divest a biological parent of custody whenever the parent has forfeited that right by not exercising it without cause for a long period of time, and by allowing someone else to become a psychological parent. A court may also refuse custody to the biological parent when the parent is unfit to have custody.<sup>225</sup> The existence of this trend should not be confused with its theoretical validity under a strict analysis of the Civil Code.<sup>226</sup>

Only disputes between a husband and a wife were contemplated by the Louisiana Civil Code. Thus, the Fourth Circuit in *Lulich v. Lulich*<sup>227</sup> held that

220. Even though a decision awarding custody may be *pendente lite* pursuant to LA. CIV. CODE art. 146, or "final" as under LA. CIV. CODE art. 157, it will never be "permanent" in the sense that custody is always open to review upon changed circumstances. However, whether *pendente lite* or permanent, it is always difficult to alter, as courts view change as damaging to children.

221. 276 So.2d 408 (La. App. 2d Cir. 1973).

222. 367 So.2d 162 (La. App. 2d Cir. 1979).

223. 290 So.2d 675 (La. 1974).

224. 235 La. 579, 105 So.2d 228 (1958).

225. A court's transfer of a child from parental to non-parental custody or its establishment of legal as opposed to *de facto* custody will not be allowed, if such a decision is based on a neglect complaint or action by the non-parent; such a decision will be allowed, however, pursuant to a parent's habeas corpus action. See *Griffith v. Roy*, 263 La. 712, 269 So.2d 217 (1972); *Stuckey v. Stuckey*, 276 So.2d 408 (La. App. 2d Cir. 1973); *Hall v. Hall*, 367 So.2d 162 (La. App. 2d Cir. 1979).

226. See PASCAL & SPAHT, *supra* note 185, at 207, 364, 476.

227. *Lulich v. Lulich*, 361 So.2d 451 (La. App. 4th Cir. 1978).

“the best interests of the child” test applied under Article 157 only to the husband and wife. Moreover, the court stated, if the husband and the wife are believed to be unfit, the proper forum for awarding custody to a third party is the public court, in an action brought by the state.<sup>228</sup>

The Third Circuit, however, in *Girouard v. Halpin*,<sup>229</sup> determined that the district court would not abuse its discretion by awarding custody to a non-parent on the basis of the parents’ unfitness and the best interests of the child. The court of appeals held that a juvenile court would have exclusive jurisdiction only if the child were currently in a state of neglect. In the *Girouard* case, the mother’s step-sister, who had physical custody of the child, had previously brought an action to obtain legal custody. In a summary proceeding to which the mother acquiesced, the district court had awarded custody to the step-sister. The mother then filed a summary proceeding to regain custody from her step-sister. In approving the retention of custody in the step-sister, the Third Circuit, sitting *en banc*, relied on a footnote in *Griffith v. Roy*<sup>230</sup> to hold that the district court in the prior proceeding had jurisdiction to award custody in the step-sister. Although the *Griffith* decision required that an “action to have a child declared neglected” be brought in juvenile court (a public forum), this requirement was not applicable in an action for custody by a parent or non-parent. The circuit court in *Girouard* also found that the evidence clearly supported the trial court’s finding that the mother of the child was unfit to have custody.<sup>231</sup>

The Third Circuit in *Snell v. Snell*,<sup>232</sup> on the other hand, subsequently held that the mother need not meet a “double burden” rule to regain custody of a child presently in the custody of the child’s grandmother. The *Snell* court, citing *Wood v. Beard*,<sup>233</sup> held that in a contest for custody between a parent and non-parent, the parent is entitled to custody unless he has forfeited his or her right, or is unfit or unable to care for the child. Unique circumstances may warrant unique custody decrees calling for closer judicial supervision than normally employed.<sup>234</sup>

#### 4. The Current Trend

The parent of a child has a right, superior to that of any non-parent, to custody of the child. Furthermore, the jurisprudential trend in Louisiana is to displace the parent’s right to custody of his child only under exceptional cir-

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228. *Id. Accord*, *Griffith v. Roy*, 263 La. 712, 269 So.2d 217 (1972).

229. 368 So.2d 1139 (La. App. 3d Cir. 1979).

230. 263 La. 712, 269 So.2d 217, 222 n.5 (1972).

231. *Girouard v. Halpin*, 368 So.2d 1139 (La. App. 3d Cir. 1979).

232. *Snell v. Snell*, 361 So.2d 936 (La. App. Cir. 1978).

233. *Wood v. Beard*, 290 So.2d 675 (La. 1974).

234. *Snell v. Snell*, 361 So.2d 936 (La. App. 3d Cir. 1978). *See also* *Arnold v. Arnold*, 376



cumstances indicating the parent's unfitness or forfeiture. This trend has developed notwithstanding the fact that the Civil Code articles relating to custody disputes<sup>235</sup> provide that custody should be placed in one of the parties to the separation or divorce action.

This trend may be inconsistent with the theory and structure of the Civil Code. The Civil Code system envisioned parental authority and tutorship as aspects of private substantive law. The substantive law relating to persons comprehends parental authority and tutorship, which include the right to custody.<sup>236</sup> The state, as *parens patrie*, may, in neglect, abuse or abandonment proceedings in public courts, deny and remove custody from a parent or tutor who holds the substantive legal authority to a third party.<sup>237</sup> However, the theoretical civilian distinction between public and private law should prevent civil district courts from denying custody, unless the private substantive law provides them with such authority.<sup>238</sup> Notwithstanding the substantive structure, the jurisprudence appears to have recognized some authority in the civil district courts to deny or remove parental custody, and parental or tutorial authority, upon a finding of unfitness or other type of forfeiture. This trend may represent a judicial reaction to the difficulty of meeting the public law standard for proving neglect, abandonment or delinquency. Nevertheless, the trend is consistent with the law in common law jurisdictions and with the development of the law in France, although the French Parliament has recognized the trend and given it legislative sanction.<sup>239</sup> The Louisiana courts appear to have adopted, without expressly stating, the notion of the "psychological parent," promoted by psychoanalysts Goldstein, Freud and Solnit.<sup>240</sup> Apparently, if the biological parents have allowed their child to remain with a third party for a significant period of time so that the child is emotionally attached to the new parents, the courts may consider the biological parents to have forfeited their parental authority.

#### D. *The Development of the "Maternal Preference" Rule*

Civil nations have long recognized the biological parent's natural right to the custody of his or her children. In 1888, the Louisiana Legislature accorded the biological mother legislative preference over the biological father in

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So.2d 528 (La. App. 3d Cir. 1979); *Bordelon v. Bordelon*, 381 So.2d 871 (La. App. 3d Cir. 1980).

235. PASCAL & SPAHT, *supra* note 185 at 206-207.

236. *Id.*

237. *Id.*

238. The French Civil Code provides the French counterparts to our district courts with this authority. See FR. C. CIV. art. 287-288, 378-381.

239. *Id.* See notes 87-105 and accompanying text *supra*.

240. GOLDSTEIN, FREUD & SOLNIT, *supra* note 180.

custody disputes. Prior to this time, Civil Code Article 146 had mandated a preference in favor of the father. This paternal preference, which was a legacy of Louisiana's Roman heritage, was based on the notion that the father as patriarch of his family was the proper person, during the ongoing marriage, to decide disputes regarding child rearing and custody.<sup>241</sup>

The evolution from a paternal to a maternal preference in custody proceedings was grounded in the religious and cultural perception that the correct person to care for a child was the child's mother. A man's abilities to rear children came to be considered inferior to a woman's abilities, and the courts recognized custody as part of the "essential nature of [a mother's] maternal role."<sup>242</sup> The United States Supreme Court, in *Bradwell v. Illinois*,<sup>243</sup> affirmed the maternal preference. The Court stated:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.<sup>244</sup>

Thus, the mother was considered to be the correct person to raise her children. Before long, a mother was considered to have a *right* to custody of her children.

In recent years, the concept of "the best interests of the child" has evolved in Louisiana, as in other states, as an appropriate and possible alternative basis for determination of child custody.<sup>245</sup> However, even with the recognition that the child's best interests should control in a determination of custody, the presumption that the mother best serves those interests has allowed for little, if any, deviation from the "maternal preference" rule.<sup>246</sup> For example, until 1977, Civil Code Article 157,<sup>247</sup> provided that custody should be awarded to the party who obtained the divorce. In spite of this express language, however, the provisional preference for the mother articulated in

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241. Paternal preference and control was also part of the Anglo-American and Germanic traditions. See notes 1-46 and accompanying text *supra*. See also Note, *Child Custody: Preference to the Mother*, 34 LA. L. REV. 881 (1974) [hereinafter cited as Note, *Preference to the Mother*].

242. *Id.*

243. 83 U.S. 130 (1872).

244. *Id.* at 141.

245. *E.g.*, *Estes v. Estes*, 261 La. 20, 24-25, 258 So.2d 857, 859 (1972); *Fulco v. Fulco*, 259 La. 1122, 254 So.2d 603, 605 (1971); LA. CIV. CODE art. 157 (amended 1977 & 1979); LA. CIV. CODE art. 146 (amended 1979).

246. Although most states have eliminated the "maternal preference" rule (see, e.g., CAL. CIV. CODE § 4600 (West Supp. 1979)), in 37 states which have promulgated so-called equalization laws, a de facto "maternal preference" rule actually exists. Roth, *supra* note 46, at 423.

247. Compare LA. CIV. CODE art. 157 with FR. C. CIV. art. 302. See note 96 and accompanying text *supra*.

the pre-1979 Civil Code<sup>248</sup> extended to all custody proceedings.<sup>249</sup> Thus, the presumption tracked the French presumption that the welfare of the children was best served by granting custody to the mother.<sup>250</sup> Accordingly, Louisiana courts consistently awarded custody to the mother, reasoning that such an award best served the welfare of the children. The mother was denied custody only if she was found unfit.<sup>251</sup> The father was awarded custody only if he could prove that the mother was "morally unfit."<sup>252</sup>

Occasionally, the preference for the mother's right was favored over the child's need for stability.<sup>253</sup> For example, in *Estes v. Estes*,<sup>254</sup> a mother sought to obtain custody of her children from the father. Although the trial court did not determine that such a change would serve the better interests of the children, the Louisiana Supreme Court approved the lower court's decision to award the mother custody. The court reasoned that, as a mother, she had a greater right.<sup>255</sup>

#### E. *Exceptions to the "Maternal Preference" Rule*

The state has an interest in the extent to which a parent satisfies his child's physical needs. However, the state, in custody determinations, requires more than mere fulfillment of physical needs for food, clothing, shelter, affection and education. The state, pursuant to "the best interests of the child" test, also requires that the child be "taught by word and example the principles of common decency and commonly accepted social and moral standards and concepts."<sup>256</sup>

248. Prior to its amendment in 1979, LA. CIV. CODE art. 146, provided:

If there are any children of the marriage, whose provisional keeping is claimed by both the husband and wife, the suit being yet pending and undecided, it shall be granted to the wife . . . unless there should be strong reasons to deprive her of it, either in whole or in part . . . *Id.*

249. For a discussion of the similar development in French law, see notes 153-180 and accompanying text *supra*.

250. *Fulco v. Fulco*, 259 La. 1122, 254 So.2d 603 (1971).

251. *Id.*

252. *Id.* See *Vidrine v. Demourelle*, 363 So.2d 943 (La. App. 3d Cir. 1978), where the child remained in the home of mother. See also *Broussard v. Broussard*, 320 So.2d 236 (La. App. 3d Cir. 1975), wherein the "maternal preference" rule was constitutionally upheld. The court noted that for two reasons this rule is not "unreasonable, capricious, or arbitrary," in violation of the Louisiana constitution. See, LA. CONST. art. 1, § 3. First, it is a "simple fact that the day-to-day care of minor children has traditionally, in our society, been in the hands of the mother rather than the father." *Id.* Secondly the "obvious biological connexity" between the mother and child creates a relationship, which in the court's opinion "gives . . . a biological basis for the historical legal preference given the mother in questions of custody." *Id.*

253. See Note, *Preference to the Mother*, *supra* note 241.

254. 258 So.2d 857, 859 (La. 1972).

255. *Id.*

256. *Cleeton v. Cleeton*, 369 So.2d 1072 (La. App. 1st Cir. 1979). The Louisiana Supreme Court affirmed this first circuit decision transferring custody from the mother to the father even

Under the "maternal preference" rule, the child's best interests, especially when the child was young, were best served by awarding custody to the mother, unless exceptional circumstances existed. The exceptional circumstances that would deny a mother custody included her physical or emotional inability to care for the child. More commonly, custody was denied because the mother was morally unfit.<sup>257</sup> Courts became preoccupied with moral suitability, focusing on sexual promiscuity. Open public adultery for a substantial period of time would constitute unfitness and would provide a basis for removal from or denial of custody of the mother.<sup>258</sup>

In *Monsour v. Monsour*,<sup>259</sup> the Louisiana Supreme Court emphasized that it was primarily interested in serving the moral best interests of the child. Mrs. Monsour, the mother of a nine-year old boy, had been awarded permanent custody and had maintained a wholesome atmosphere in her home for some three or four years until she began to live with an unmarried male whom she intended to marry. When her ex-husband filed process to have custody changed, the mother realized that the arrangement might be harmful to her son and soon married her cohabitant. The Louisiana Supreme Court held that the person seeking to change custody bears a heavy burden of proving the present circumstances to be so deleterious to the child's welfare as to warrant removal. The court held that the trial court did not abuse its discretion in determining that the mother's marriage to her cohabitant had re-established an atmosphere that would promote the child's best interests.<sup>260</sup>

Nevertheless, past misconduct may, despite its reform, be an important consideration in determining present suitability, even though custody awards

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though the children were "happy, healthy, and well behaved," and even though they were doing very well in school. See *Cleeton v. Cleeton*, 383 So.2d 1231 (La. 1979). The Court stated:

The effect of conduct of this nature (open and notorious adultery over an extended period in home while the children were present) instilled in the hearts and minds of children of tender years by their mother cannot manifest itself until they attain a stage in life where their physical state permits and they are called upon to decide what their own standards of conduct will be. And if we accept, as we do, the premise that an open and notorious adulterous relationship by the mother of children of tender years will influence those children in later life to consider such conduct acceptable, we must then decide the effect in law of that standard.

[A]dultery of the mother, especially when it is open and public for a substantial period of time, in total disregard of the moral principles of society, has repeatedly been held to establish that the mother is morally unfit to maintain custody of her children.

*Id.* at 1233. The court distinguishes *Fulco v. Fulco*, 259 La. 1122, 254 So.2d 603 (1971), on the basis of the "calculated and continued public course of immoral conduct" condemned but not present, in *Fulco*. *Cleeton v. Cleeton*, 383 So.2d 1231, 1234 (La. 1979).

257. *Fulco v. Fulco*, 259 La. 1122, 254 So.2d 603 (1971).

258. *Strother v. Strother*, 248 So.2d 867, 870 (La. 1971). See also *Cleeton v. Cleeton*, 383 So.2d 1231 (La. 1979).

259. 347 So.2d 203 (La. 1977).

260. *Id.* For a discussion of the resolution of similar problems in French jurisprudence, see, e.g., Judgment of Dec. 17, 1964, Cour d'appel, Bordeaux, [1965] D.S. Jur. 144-45.

are not considered punitive. Thus, in one case,<sup>261</sup> the mother was denied custody upon evidence that she had, in the past, engaged in sexual activity with three men, including once while merely separated from her husband and once in the presence of her child.

In another case,<sup>262</sup> the Louisiana Supreme Court appeared to endorse punishment for past misconduct. In that case, the court denied custody to a mother who, seventeen months earlier, had engaged in a three-month affair, even though she was otherwise found to be a good parent.<sup>263</sup> The Louisiana Supreme Court found that a mother may be denied custody in favor of the father or another who claims "lawful" custody when she engages in a course of open and public adultery in defiance of accepted moral principles, community mores, and in disregard of the embarrassment and injuries she might cause her children.<sup>264</sup> Justice Tate wrote a strongly worded dissent in which he suggested that the court was looking past the best interests of the children in an attempt to punish or reform the mother.<sup>265</sup>

#### F. *The Decline of the "Maternal Preference" Rule*

##### 1. Constitutionality

The preference or presumption favoring the mother in custody decisions has weakened for several years. First, the rule has been challenged on constitutional grounds.<sup>266</sup> In 1975, the Third Circuit upheld the constitutionality of the rule in Louisiana.<sup>267</sup> However, the United States Supreme Court case of *Craig v. Boren*<sup>268</sup> limited, if not invalidated, the rule. In *Craig*, the Court held that statutes which discriminate on the basis of gender will be overturned unless they are found to be substantially related to "important state

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261. *Harrison v. Harrison*, 359 So.2d 266 (La. App. 2d Cir. 1979).

262. *Schexnayder v. Schexnayder*, 371 So.2d 769 (La. 1979); *Cleeton v. Cleeton*, 383 So.2d 1231 (La. 1979).

263. *Schexnayder v. Schexnayder*, 371 So.2d 769 (La. 1979).

264. *Id.* at 770. The facts that compelled this court to find the mother unfit, even though the misconduct had long since ended were that she had met her "lover" at a car wash and had proceeded within a week to begin her illicit affair. *Id.* She would pretend to go play bingo, leave her children with her mother-in-law, and go meet her paramour, "behind a school, behind a church, or other such places" and then go to the hotel for sexual relations. *Id.* On one occasion, she parked her car, walked across the parking lot and entered her paramour's van in which they proceeded to the levee for sex. *Id.* The affair was notorious in the small community because of the parties' indiscreet meetings, their difference in race, the open disregard for the embarrassment and injury that the affair would cause her family, and their defiance of community standards. *Id.* The court reasoned that when the mother is so openly in disregard of community mores and openly disregards her children's feelings and care, she has failed to meet the standards required of a mother in rearing her children properly. *Id.*

265. *Id.* at 777.

266. *Stanley v. Illinois*, 405 U.S. 645 (1972).

267. *Broussard v. Broussard*, 320 So.2d 236 (La. App. 3d Cir. 1975).

268. *Craig v. Boren*, 429 U.S. 190 (1976).

interests.” The Court applied a level of “intermediate scrutiny,”<sup>269</sup> which continues to be applied in the United States to gender discrimination cases.<sup>270</sup>

## 2. Article 157 and the “Maternal Preference” Rule

Another drawback of the “maternal preference” rule is that, while it affords the court a convenient tool for making custody determinations, the rule prevents a thorough examination of the facts of each case, and often hampers rather than serves the welfare of the children.<sup>271</sup> Dissatisfaction with the rule has grown steadily.

In 1977, Article 157 of the Louisiana Civil Code was amended to read:

In all cases of separation and divorce, and changes of custody after an original award, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children, without any preference being on the basis of the sex of the parent.<sup>272</sup>

Since the amendment, the Louisiana circuits have been split as to whether the “maternal preference” rule has been abrogated or whether it continues in some form.

The Second Circuit, in *Hegan v. Hegan*,<sup>273</sup> and the Fourth Circuit, in *Spencer v. Talabock*,<sup>274</sup> have found the Article 157 amendment abrogates the “maternal preference” rule. In *Hegan*, the father was awarded custody of his young child because of the wife’s adultery. Prior to the judgment and award of custody, the father had been in physical custody of the child for several months while the mother was away from the matrimonial domicile. Moreover, prior to this extended absence of the mother, the father had on several occasions cared for the child while the mother had been away from the domicile for medical care. The trial court found the child to be happy, well adjusted, and well cared-for in the father’s custody. The Second Circuit affirmed the judgment awarding custody to the father, rejecting the mother’s argument that the child should be awarded to her unless she was found to be morally unfit or otherwise unsuitable. The court construed Article 157, as amended, to eliminate any absolute preference for the mother. The court stated:

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269. *Id.* at 197. For a discussion of these equal protection tests as they apply to Louisiana legislation, see Note, *Louisiana’s Presumption of Paternity: The Bastardized Issue*, 40 LA. L. REV. 1024 (1980); Bilbe, *Constitutionality of Sex Based Differentiations in the Louisiana Community Property Regime*, 19 LOY. L. REV. 373 (1972). See also *Constitution & Family*, *supra* note 50.

270. *Caban v. Mohammed*, 441 U.S. 380 (1979); See also *Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Constitution & Family*, *supra* note 50.

271. See Note, *Preference to the Mother*, *supra* note 241.

272. LA. CIV. CODE art. 157 (amended 1977 & 1979).

273. 367 So.2d 147 (La. App. 2d Cir. 1979).

274. 370 So.2d 684 (La. App. 4th Cir. 1979).

We do not hold that a close natural bond between a mother and child of tender years, if present, should not be considered in determining what would be best for the child. We admit, as stated by this court in *Brackman v. Brackman*, 322 So.2d 314 (La. App. 2d Cir. 1975), that one of the many factors to consider in determining the best interest of the children is the desire to continue them in the care of the person who, in normal situations, has provided the degree of continuous care and affection which creates such a close bond that it would be harmful to the children to alter that relationship by granting custody to the father. This factor should be considered, but should not be given such weight as to only be overcome by a showing that the mother is unfit or unstable.<sup>275</sup>

In this case, the court noted, the strong psychological bond existed between the father and child rather than between the mother and child.

However, in *Coltharp v. Coltharp*,<sup>276</sup> a different panel of the Second Circuit reinterpreted new Article 157 as a possible codification of the "maternal preference" rule. The court stated that it was in the child's best interests to be placed in the custody of his mother at the time of initial custody determination. However, the court qualified this conclusion by adopting the "psychological parent" doctrine, in preference to the strict "maternal preference" rule, finding that the mother should be awarded custody when she has been the person with the closest relationship to the child. The panel reasoned that, because Article 157, as amended, prescribes "the best interest of the child standard" for determining disputed custody and, because those interests are best served by the mother in most cases, the legislature must have intended to retain the "maternal preference" rule.<sup>277</sup> Nevertheless, custody was actually awarded to the father on the basis of a modified "double burden" rule. The father had been in *de facto* custody for sixteen months prior to the custody hearing. The court found the "maternal preference" rule to be inapplicable in this situation, because the preference was designed to apply to initial custody determinations following the separation of the spouses. The court explained that:

The rule was designed to continue the custody of these young children with the mother after the separation of the spouse because it was to the best interest of these children that they remain subject to the direct custody and control of their mother who had cared for them prior to the separation. It may be that C. C. Article 157 . . . could be construed to have legislatively eliminated the maternal

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275. *Hegan v. Hegan*, 367 So.2d 147 (La. App. 2d Cir. 1979). In this case the court, again, was concerned about, and adopted without so stating, the notion of the "psychological parent."

276. *Coltharp v. Coltharp*, 368 So.2d 793 (La. App. 2d Cir. 1979).

277. *Id.*

preference rule since it provides that the child should be awarded to the husband or wife in accordance with the best interest of the children. The amendment to the Article probably makes no change in the law since the maternal preference rule was always based upon the notion that it was to the best interest of a child of young and tender age to be placed in the custody of the mother at the time of the initial custody determination. The rule has no application to this situation where the father has been exercising actual custody over these two young boys for over 16 months prior to this custody hearing.<sup>278</sup>

Thus, the court here adopted the “psychological parent” doctrine. According to this doctrine, custody is awarded to the parent who has developed the closest relationship with the child. The mother is not necessarily given preference.

### 3. The “Double Burden” Rule

#### a. *Definition*

While some panels of Louisiana circuits have, as in *Coltharp*, given custody to the father while recognizing the validity of the “maternal preference” rule, other courts of appeal have based their decision that custody ought to be given to the mother simply on the basis of the “double burden” rule. This rule<sup>279</sup> was jurisprudentially developed to protect the best interests of children. The courts reason that, because it is not in the best interests of a child to be the subject of a court battle and because it may be detrimental for a child to have his custody changed frequently, once awarded, custody should not be changed except in extraordinary circumstances. One seeking to change custody has been required to prove: (1) that the present environment of the child is detrimental to his best interests and well-being; and (2) that the non-custodial parent is able to provide an environment that will better serve the interests and welfare of the child.

Prior to its amendment in 1979, Article 146 expressly provided for maternal preference in temporary custodial awards. Application of this preference also operated as a *de facto* award of permanent custody. When a final determination of custody was made under Article 157, the courts usually awarded custody to the mother because, under the “double burden” rule, it was considered detrimental to change the custody of the child. Although the decisions ap-

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278. *Id.* at 796. See also *Doyle v. Doyle*, 371 So.2d 344 (La. App. 4th Cir. 1979).

279. See, e.g., *Decker v. Landry*, 227 La. 603, 80 So.2d 91 (1955); *Fulco v. Fulco*, 259 La. 1122, 254 So.2d 603 (1971). The “double burden” rule represents an evidentiary presumption or common-sense predisposition that courts have adopted.



peared to be based on "the best interests of the child" standard, the outcomes were, in fact, gender-based.<sup>280</sup>

b. *Viability of the "Double Burden" Rule*

Over the years courts have limited the application of the "double burden" rule. For example, in 1976, the Louisiana First Circuit Court of Appeals<sup>281</sup> held that the "double burden" rule should apply only when the initial custody award was a considered decree. Thus, if the initial decree was based on a stipulation of the parties or was awarded in a default judgment, requiring that the hearing to change custody be similar to an original custody hearing, there would be no requirement that the parent seeking to change custody meet the "double burden" rule.

In *Hays v. Hays*,<sup>282</sup> the First Circuit noted that the "maternal preference" rule had undergone significant restriction since the *Fulco* decision and the amendment of Article 157. The court's opinion included a discussion of *Mon-sour v. Monsour*,<sup>283</sup> where the Louisiana Supreme Court held that a person seeking a change of custody bears a heavier burden of proof only if a considered decree had been previously rendered in the case. In *Hays*, the mother held custody pursuant to a stipulation. Thus, the father, who was seeking a change of custody, was not required to satisfy the heavier burden rule. Instead, he only had to demonstrate that a change in custody would be in the child's best interests. However, the court did prescribe a number of guidelines used to determine a child's best interests. These guidelines included:

1. the experience of the child with the mother;
2. the rebuttable presumption that the interests of a child will be better served by placing him in the custody of the mother;
3. "convincing evidence that the greater advantage of the child will be better served by entrusting his care to the father."<sup>284</sup>

The circuits have not been internally consistent in their analysis of how the "double-burden" rule should be applied. Even after the 1977 amendment to Civil Code Article 157 the Second and Third Circuits held that *de facto* custody was sufficient to trigger the application of the "double burden" rule, reasoning that it simply is not in the best interests of the children to have custody changed frequently. Nevertheless, in *Myers v. Myers*<sup>285</sup> the Third Circuit con-

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280. *E.g.*, *Hays v. Hays*, 365 So.2d 563 (La. App. 1st Cir. 1978); *Coltharp v. Coltharp*, 368 So.2d 793 (La. App. 2d Cir. 1978).

281. *Stevens v. Stevens*, 340 So.2d 584, 586-87 (La. App. 1st Cir. 1976).

282. 365 So.2d 563, 565 (La. App. 1st Cir. 1978).

283. *Id.* *Monsour v. Monsour*, 347 So.2d 203 (La. 1977).

284. *Id.* *But see* *Coltharp v. Coltharp*, 368 So.2d 793 (La. App. 2d Cir. 1979).

285. 370 So.2d 172, 174 (La. App. 3d Cir. 1979).

cluded that there can be no rigid application of the "double burden" rule. In *Myers*, the father had been awarded custody of a minor daughter after his divorce from his wife on the ground of adultery. The wife had filed an answer to the petition for divorce, but did not appear at the trial. Shortly after the divorce, the wife married her paramour, and then filed to gain custody of the child. The trial court approved the wife's petition. On appeal the Third Circuit found that the *Fulco* decision had discarded the "double burden" rule. The court held that it was in the best interests of the child under these circumstances to award custody to the mother. Thus, a change in custody was approved. The decision reaffirmed *Bushnell v. Bushnell*<sup>286</sup> which had held that a mother seeking to recover custody of a child does not have to meet the "double burden" rule.

Finally, in *Harrison v. Harrison*,<sup>287</sup> the Second Circuit held that when a *pendente lite* decree of child custody is awarded in favor of a child's mother three years prior to the action to change custody, the party seeking a change of custody bears the heavy burden of proving that the child's continued custody with the mother would be detrimental to the child's welfare and best interests. Thus, since the enactment of the 1977 amendment to Article 157, there has been considerable confusion among the Louisiana circuits regarding the "maternal preference" rule and the "double burden" rule.

#### 4. Recent Amendments

The 1979 amendments to Civil Code Article 146, which eliminate the explicit maternal preference for *pendente lite* custody determinations, and the additional amendment to Article 157 should clarify the conflicting case law. Custody *pendente lite* determinations, like permanent ones, must now be made to either parent in accordance with the best interests and welfare of the child. Although the reforms do not expressly proscribe a gender-based preference for a particular parent, the deletion of the express preference for the mother appears to eliminate the presumption of a gender-based preference. Both Articles 146 and 157 prescribe the "best interests of the child" test to determine which parent should have custody. Article 146 provides that the court "shall inquire into the fitness of both the mother and the father and shall award custody to the parent the court finds will in all respects be in accordance with the best interest of the child."<sup>288</sup> The same test now applies to permanent custody awards and to changes of custody.<sup>289</sup>

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286. 348 So.2d 1315, 1316 (La. App. 3d Cir. 1977).

287. *Harrison v. Harrison*, 359 So.2d 266 (La. App. 2d Cir. 1979).

288. LA. CIV. CODE art. 146.

289. LA. CIV. CODE art. 157 (amended 1979). This article currently provides:

A. In all cases of separation and divorce, and changes of custody after an original

The amendments thus appear to require that a custody decision be based on a determination of which parent has the closer relationship with the child and which parent will thereby better serve the physical, emotional and moral needs of that child. The gender of the spouse seeking custody as well as the impact a custody change might have on the welfare of the child may be considered relevant factors, but neither consideration retains its status as a presumption.

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award, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children, without any preference being given on the basis of the sex of the parent. Such custody hearing may be held in private chambers of the judge. The party under whose care the child or children is placed or to whose care the child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died. *Id.*

B.(1) If subsequent to the granting of a divorce or separation one of the parties to the marriage dies and is survived by a minor child or children of the marriage, the parents of such deceased party may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interests of the child or children . . . *Id.*

(2) If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable. *Id.*

(3) All laws or parts of laws in conflict herewith are hereby repealed. *Id.*

The provisions of article 157 are mandatory. In addition, if there are no pending proceedings, the court must award permanent, rather than temporary, custody. *Barrilleaux v. Barrilleaux*, 381 So.2d 518, 518 (La. App. 1st Cir. 1979). As amended in 1979, article 157 reflects a legislative intent to terminate the "maternal preference" rule and to substitute a rule whereby the best interest of the child would be determined on the basis of the relative fitness and ability of the competing parents in all respects to care for the child. In fact, it is often in the best interest of the child that custody be awarded to the mother. *Thornton v. Thornton*, 377 So.2d 808, 809-10 (La. App. 1st Cir. 1980).

In *Thornton* the father was awarded custody on the basis of the mother's erratic behavior and testimony given by a psychiatrist who had examined her. *Id.* In another case, the father was awarded custody because the mother was morally unfit, living in open adultery with a man in such an unwholesome environment as to be grossly harmful to the moral welfare of her children. *Atteberry v. Atteberry*, 379 So.2d 18, 20 (La. App. 3d Cir. 1979), *cert. granted*, 381 So.2d 1231 (La. 1980).

With regard to the change of custody provisions of article 157, one court has recently held that in order to have custody of a child transferred from a maternal aunt who has been rearing the child to a situation where the child will be raised by one parent, it is only necessary to prove that the best interest of the child will be served by this change in custody. *See Arnold v. Arnold*, 376 So.2d 528, 531 (La. App. 3d Cir. 1979). Article 157 states that either the husband or the wife can raise the child, thereby terminating the "maternal preference" principle. LA. CIV. CODE art. 157.

A third circuit court has held that the 1979 amendment to article 157 abrogated the "double burden" rule. *See Bordelon v. Bordelon*, 381 So.2d 871, 873 (La. App. 3d Cir. 1980). The court explained that the legislation was both interpretive and procedural and should be applied retroactively. *Id.* Prior custody, however, will still be a factor for policy consideration as the underlying notion of the "double burden" rule is the stability of the child's environment. The concurring opinion in this case correctly concludes that this is a procedural rather than a substantive problem. *Id.* at 876. For a concise history of the "double burden" rule, *see id.* at 873. *But see Shanklin v. Shanklin*, 376 So.2d 1036 (La. App. 1st Cir. 1979); *Lucien v. Lucien*, 378 So.2d 518 (La.

### 5. The "Maternal Preference" Rule in Other States

Many states have amended their laws to eliminate any presumption favoring either spouse in custody proceedings. New York courts, for example, have found constitutionally questionable the presumption that children of tender years should be placed in the custody of their mother. One New York court has found that "[l]egislative classifications . . . may not be premised on unalterable sex characteristics that bear no necessary relationship to the individual's need, ability of life situation."<sup>290</sup> This court held that the "maternal preference" rule for children of tender years is inconsistent with "the best interests of the child" standard, which is required by the New York domestic relations statute. In fact, the court held that "the best interests of the child" standard was designed to eliminate any gender-based presumptions.<sup>291</sup>

The New York decision and the trend it represents reflect the goals of the recent amendments enacted by the Louisiana legislature. Some social scientists have indicated that enthusiasm for the trend ought to be restrained. These writers argue that gender should remain a consideration, although not necessarily a presumption, in custodial awards. According to this view, it may not be in the best interest of the child to allow courts to disregard the gender of the parents and the child in their determinations of custody. One authority has stated:

[C]hildren must have adult models with whom to identify. Which parent they need most will vary according to age and, of course, according to the sex of the child. It has become traditional for mothers to be the parent of first choice for children below the age of adolescence. This is psychologically sound, provided that the mother is emotionally capable. With the onset of adolescence, however, the like-sexed parent becomes more important since learning to become male or female is the principal psychological task for that age group. This means that with boys there should be a higher incidence of placement with fathers if the needs of male children are to be met.<sup>292</sup>

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App. 4th Cir. 1979). *Schober v. Schober*, 380 So.2d 139 (La. App. 1st Cir. 1979). (These cases did impose the "double burden" rule in change of custody cases; they apparently did not apply article 157 retroactively).

With respect to giving custody to the parent or the non-parent, a rebuttable presumption was established in *Wood v. Beard*, 290 So.2d 675 (La. 1974), that the child's best interests are better served by awarding custody to the parent, rather than the non-parent, absent proof of the parent's unfitness or inability to provide care. See also *Deville v. LaGrange*, 379 So.2d 37, 40-41 (La. App. 3d Cir. 1979), cert. granted, 381 So.2d 1230 (La. 1980). (This case resulted in an amendment to LA. CIV. CODE art. 256 concerning tutorship of the illegitimate child); *Juneau v. Bordelon*, 380 So.2d 208 (La. App. 3d Cir. 1980).

290. *State ex rel Watts v. Watts*, 77 Misc.2d 1084, 350 N.Y.S.2d 285, 290 (1973).

291. *Id.*

292. *Watson, The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L.

Perhaps the views of psychiatrists and psychologists, though inconclusive, should be considered by courts.<sup>293</sup> If this conclusion represents a well-accepted view, the gender of the parties involved in a custody dispute may be a proper factor to consider. If the amendments to Civil Code Articles 146 and 157 are construed to eliminate the consideration of gender even as a factor, the best interests of the child standard might prove, ironically, to be not in the best interests of the child.

Perhaps the courts and legislatures avoid the question by awarding custody to one or the other parent. The best interests of the child are in fact served when a child is able to have a relationship with both parents. In most custody disputes both parents love, care for, and want the child. Most parents are not unfit or otherwise unsuitable to have custody. The judge's charge to find a solution in the best interests of the child mandates application of a nebulous and difficult standard when the decision must be made between two worthy parents.<sup>294</sup> It seems absurd to assume that it is necessary to make a choice at all and eliminate the important role of either parent for his or her child, simply because the marital relationship of the parents has broken down. Nevertheless, this absurdity is the rule in Louisiana courts and in most other states.

#### V. CHILD CUSTODY AND PARENTAL AUTHORITY IN OTHER STATES OF THE UNITED STATES

##### A. *During the Ongoing Marriage*

Generally, state family law in the United States provides that parents in an ongoing traditional family have the concurrent rights and obligations to live with, supervise, care for, rear and educate their children.<sup>295</sup> In conjunction with these rights and obligations, parents have the authority to consent to their children's medical care and to administer their children's earnings.<sup>296</sup> Most

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REV. 55 (1969), *cited in* H. KRAUSE, FAMILY LAW (1978).

293. *Id.*

294. It would be a mistake if this standard were to be the conduit for nearly unfettered judicial discretion in applying personal lifestyle preferences in child custody disputes.

295. *See, e.g.*, DEL. CODE ANN., tit. 13, §§ 701, 703; CAL. CIV. CODE, §§ 196, 196(a) (West Supp. 1980); N.Y. DOM. REL. LAW § 32 (McKinney); ILL. REV. STAT. ch. 3, § 132. *See also* notes 1-46 and accompanying text *supra*; Mnookin, *supra* note 46, at 228 n.10.

296. The parental right to, and authority over, children of the marriage has not been seriously questioned in the United States; indeed, it has actually been constitutionalized. *See generally Constitution & Family*, *supra* note 50; Mangrum, *Exclusive Reliance on the Best Interests of the Child Test May Be Unconstitutional: Religion As a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. \_\_\_\_ (1981).

Justice Blackmun, on June 1, 1981, in his dissenting opinion in the case of *Lassiter v. Dept. of Social Services of Durham County*, \_\_ U.S. \_\_, 101 S. Ct. 2153 (1981), explained the constitutional preeminence of this right:

This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility . . . [F]ar more precious . . .

than property rights . . . parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," . . . and to be more significant and priceless than "liberties which demure merely from shifting economic arrangements." . . . Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. . . . Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing . . . and in retaining the custody and companionship of the child.

*Id.* at 2165-66.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the United States Supreme Court held a Nebraska law that prohibited teaching foreign languages to children below the eighth grade level of schooling to be unconstitutional as it, "... interfere[d] with the calling of modern language teachers, with the opportunities of students to acquire knowledge, and with power of parents to control the education of their own." *Id.* at 401. A close reading of the case will indicate to the reader that the court also placed considerable weight on the rights of the children and the teachers; the court appeared more concerned about the homogenization of the society than with parental rights per se. However, the assumption of the existence of parental authority clearly exists. *Constitution & Family*, *supra* note 50.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that the right and authority of parents to send their children to private military school was part of "the liberty of parents and guardians to direct the upbringing and education of (their) children. . . ." *Id.* at 534-35. "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent." *Id.* at 518.

The United States Supreme Court has reinforced this view of the parental right and authority to rear one's own children on many occasions. In 1944, it held that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court stated that this authority was part of the "private realm of family life which the state cannot enter," absent compelling justification. *Id.* In 1968, the Court declared: "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

For a discussion of the fundamental interests of parents, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See also note 50 *supra*. With regard to the unconstitutionality of state regulation of the family, see *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

In *Belotti v. Baird*, 443 U.S. 622 (1979), four justices of the United States Supreme Court emphasized the importance of the traditional view that parental authority is an essential part of the American "tradition of individual liberty." *Id.* Although it is well recognized that parents have the right and authority to raise their children, the breadth of this authority has not been clearly established. H. CLARK, *DOMESTIC RELATIONS* 573 (1978) [hereinafter cited as CLARK]; Folberg & Graham, *supra* note 3, at 523, 537. This authority has been recognized to include the right and obligation to educate and to control the religious upbringing of one's children. The courts have also determined that parental authority includes the power to control and discipline one's children, the duty to provide necessary and appropriate medical care and the obligation to protect and care for one's children. In *Burge v. City of San Francisco*, 41 Cal.2d 608, 617, 262 P.2d 6, 12 (1953), Chief Justice Traynor defined custody during marriage as, "the sum of parental rights with respect to the rearing of a child including its care. It includes the right to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health, and religion." *Id.* The law in the United States has not differentiated between the obligation to, and authority over, one's children, at least not as it relates to the two parents during marriage. Folberg & Graham, *supra* note 3, at 538. Nevertheless, both Great Britain and Australia have recently passed legislation under which either parent may apply

states have provided that both the mother and the father are liable for the support of their children.<sup>297</sup>

However, just as in France or Louisiana, the parents will lose or forfeit these rights and obligations upon a showing of unfitness or upon proof that the child will be harmed by remaining under the authority or in the custody of his or her parents. Generally, if the parents have promoted their child's delinquency, or have been found to have participated in outrageous moral misconduct, or to have neglected, abused or abandoned their child, the state will act in its role as *parens patriae* to remove the child from parental custody.<sup>298</sup>

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for a court order differentiating and delineating custodial rights and duties during the marriage. *Id.* at 538 n.97. See also Gaddis and Bintliff, *supra* note 50. Since 1970, the majority of states in the United States have amended their laws to provide that the obligations and rights of parental authority apply equally to both parents. Folberg & Graham, *supra* note 3, at 538 n.97.1.

297. Mnookin, *supra* note 46, at 228 n.10. Since 1804, the Louisiana Civil Code has provided for a reciprocal obligation of support. See LA. CIV. CODE arts. 203, 205 (1804) (amended 1979). See also LA. CIV. CODE arts. 227, 229. See also UTAH CODE ANN. § 30-2-9; IOWA CODE § 252.2 (1970); CAL. CIV. CODE §§ 196, 196(a) (West Supp. 1980); N.Y. DOM. REL. LAW § 32 (McKinney).

298. See generally Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970). Problems relating to parental authority and custody arise in a variety of circumstances. State intervention as *parens patriae* is only one example of such a circumstance. Professor Mnookin has described custody law today as "a complicated and chaotic multiplicity of such factors as the doctrinal thread invoked, the identity of the disputants, their prior relationship to the child, and the setting from which the dispute arose." Mnookin, *supra* note 46, at 227. Issues regarding custody of children arise in at least four situations: (1) after divorce or separation; (2) in relationship to guardianship problems; (3) pursuant to juvenile court child-neglect laws; and (4) under laws relating to termination of parental rights in order to free a child for adoption. *Id.* This article will not concentrate on the latter three types of cases. One should note, however, that much of the confusion has arisen because different standards are applied, depending on the type of situation before the court. As such, some writers have suggested that there be some significant movement toward a unified standard to be applied in all cases relating to child custody. *Id.* at 246-49. See also CLARK, *supra* note 50, at 572-75.

From a psychiatric point of view, at least some experts in the field feel that "where the [psychological] tie is to adults who are 'unfit' as parents, unbroken closeness to them and especially identification with them may cease to be a benefit and become a threat. In extreme cases this necessitates state interference." GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 19-20; LA. CODE JUV. PROC. arts. 403-407; LA. CRIM. CODE arts. 74-75. See also Note, *A Fit Parent May Be Deprived of Custody of His Child If The Best Interest and Welfare of The Child Would Be Served By Allowing Another Person to Raise Him*, 4 HOUS. L. REV. 131 (1966). See, e.g., *State ex rel. Sharpe v. Banks*, 25 Ind. 495, 500 (1865); *Lovell v. House of the Good Shepard*, 9 Wash. 419, 37 P. 660 (1894). See also *In re Goodenough*, 19 Wis. 291, 296-97 (1865), wherein the courts refused to remove children from parental custody absent proof of parental unfitness. But see *In re Black*, 3 Utah 2d 315, 283 P.2d 887 (1955), *cert. denied*, 350 U.S. 923 (1955), where parental rights and authority were terminated because the parents were polygamists.

Professor Clark explains that the origins of the state's use of the *parens patriae* (power of the state to act to protect children or to act for their welfare) was part of the equity jurisdiction in England, as early as the seventeenth century. CLARK, *supra* note 296, at 572. The origin of this jurisdiction, however, is disputed. *Id.* See II J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, §§ 1327-1361 (16 ed. 1972) (London 1836); HOCHHEIMER, *supra* note 47. Story describes this power of the state which has had a long tradition in the United States:

[A]lthough, in general, parents are entrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption, that the

Recently, however, a number of states have moved away from the strict requirement that parents be found unfit before custody or parental authority may be forfeited by or removed from them. In one Louisiana case,<sup>299</sup> otherwise fit parents who apparently loved their child, but who had not seriously attempted for some seven years to regain custody over that child, forfeited their right to custody. The court held that the child's best interests would be served if she were allowed to remain with her aunt and uncle, with whom she had lived for the aforementioned seven years. The aunt and uncle had, in effect, become the child's psychological parents.<sup>300</sup>

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children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever [for example] it is found, that a father is guilty of gross ill treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education.

J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 702 (7th ed. 1857), *quoted in* Mnookin, *supra* note 46, at 240 n.67. Professor Mnookin notes that by the seventeenth century, Massachusetts, Connecticut, and Virginia specifically authorized magistrates to "bind out" or indenture children of the poor, over parental objection. *Id.* See 1 CHILDREN AND YOUTH IN AMERICA 64-70 (R. Bremner ed. 1970). The history of child-neglect laws is presented in Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972); Rendleman, *Parens Patriae: From Chancery to Juvenile Court*, 23 S.C.L. REV. 205, 223 (1971).

Of course, the power of the state as the *parens patriae* in France and Louisiana is not a part of "equity" jurisdiction, as there is no such thing. In these states, the power simply exists and is enforceable in the appropriate courts pursuant to the state's police power.

299. *Paul v. Peniston*, 235 La. 579, 105 So.2d 228 (1928).

300. She called them "mama" and "pappy." *Id.* The court reached this result in spite of the fact that the Louisiana Civil Code does not provide for the court to award custody, in the best interests of the child, to anyone but the parents of the child. See LA. CIV. CODE arts. 146, 157. The Louisiana Civil Code does provide that parental authority ends, and the regime of tutorship arises upon dissolution of the marriage of the parents, by death or divorce, or upon legal separation. LA. CIV. CODE arts. 150, 246. If read literally, if the code requires the judge to establish custody in either one or the other ex-spouse, and if tutorship belongs of right (as a matter of law) to the custodial parent, it may not be possible for a judge to allow shared or joint custody after legal separation or divorce. However, it may be possible for the judge to establish some sort of joint or shared tutorship, which includes the authority to control the person of the minor; this authority, of course, is the most important aspect of custody, as it provides the parent with the authority to rear the child. However, in order to provide for some sort of joint-tutorship, a judge will have to overcome the language of Louisiana Civil Code Article 246 which provides: "The minor not emancipated is placed under the authority of a tutor after the dissolution of the marriage of his father and mother or the separation from bed and board of either one." LA. CIV. CODE art. 246. He would also have to overcome Louisiana Civil Code Article 250 which provides: "Upon divorce or judicial separation . . . of the parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted." LA. CIV. CODE art. 250. See also LA. CIV. CODE art. 148; LA. CODE CIV. PRO. arts. 4061-4070.

Any legislation providing for joint or shared tutorship would also have to resolve the problem



Similarly, the law in California relating to child custody provides that a parent may forfeit the right to custody of his or her child and that the state may place such a child in the custody of a third party when the court finds that an award of custody to a parent would be detrimental to the child, and the award to the non-parent is required to serve the best interests of the child.<sup>301</sup> The California Supreme Court has held that the applicable section of the Civil Code allows a court to deprive a parent of custody, even though the parent is *not unfit*, "upon a clear showing that such award is essential to avert harm to the child."<sup>302</sup>

Similarly, under Texas law, a court may deprive a parent of custody of his or her child. Texas legislation allows the judge substantial discretion to award custody to third persons if "the appointment of the parent would not be in the best interests of the child."<sup>303</sup>

These changes notwithstanding, most courts in the United States correctly continue to reject the notion that the judiciary should award or remove custody of children through a balancing of the comparative strengths and weaknesses of parents and non-parents.<sup>304</sup>

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of liability for damage occasioned by the child. *See* LA. CIV. CODE arts. 2318-2319. Pursuant to Article 4069 of the Louisiana Code of Civil Procedure, the court may appoint an institution or person as tutor over the patrimony while another person may be appointed as tutor over the person of the minor child. LA. CODE CIV. PRO. art. 4069. However, there have been no cases, nor is there any direct statutory authority, for the sharing of tutorship over the person of the child. *But see* State *ex rel.* Bannister v. Bannister, 198 So.2d 196 (La. App. 1st Cir. 1967).

Nevertheless, if the standard for determination of custody (and possibly of tutorship as well) is the best interest of the child, (*see* LA. CIV. CODE arts. 146, 157, 256) if a court determines that it would be in the best interest of the child to be under a form of shared custody or tutorship, perhaps it could then establish such a regime. For a discussion of Louisiana law on this subject, *see* note 288 and accompanying text *supra*. *See also* notes 51-181 and accompanying text *supra*, for a discussion of French law on this subject. According to three noted social scientists the notion of the "psychological parent" is very important. *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 180. These three authors develop the concept and define the term "psychological parent" as follows:

Whether a parent becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult, but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

*Id.* at 19.

301. CAL. CIV. CODE § 4600 (West Supp. 1980).

302. *In re B.G.*, 11 Cal.3d 679, 699, 523 P.2d 244, 258 (1974), *cited in* Mnookin, *supra* note 46, at 228 n.9.

303. TEX. FAM. CODE ANN. § 14.01(b) (Vernon).

304. *Wood v. Beard*, 290 So.2d 675 (La. 1974); *Paul v. Peniston*, 235 La. 579, 105 So.2d 228 (1958); *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613, 617-18 (1922); *Baumann v. Baumann*, 169 Neb. 805, 807-09, 101 N.W.2d 192, 193-94 (1960); *Oster*, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965) [hereinafter cited as *Oster*]. *See also* *Gilmore v. Kitson*, 65 Ind. 402, 407, 74 N.E. 1083, 1084 (1905); *Norval v. Zinsmaster*, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898); *In re Meade*, 113 Wash. 504, 508-10, 194 P. 807, 809 (1920).

### B. *After Divorce or Separation*

The most common instance of disputed child custody arises after judicial separation<sup>305</sup> or divorce.<sup>306</sup> Courts have two problems to resolve. First, the courts must reconcile the competing demands of the parents. Second, they must protect the child.<sup>307</sup>

An evolution from the "paternal preference" rule,<sup>308</sup> to the "maternal preference" rule,<sup>309</sup> to the "best interests of the child" test has taken place in child custody determinations. Except in very early Roman and Anglo-Saxon law, courts tempered both the paternal and the maternal preferences with notions of the best interests of the child and parental fault. Thus, depending on the rule in force, courts would award custody to the father or to the mother after separation or divorce *unless* that person had been at fault, had forfeited the right or had otherwise appeared to the court to be unfit to provide for the welfare of the child.<sup>310</sup>

Analysis of the laws relating to child custody and parental authority in France and Louisiana indicates that the courts have perceived (or developed) a tension between the rights of parents to have authority over and custody of their children and the children's right as individuals to be protected. In a similar manner, most courts in the United States generally have based their decisions relating to child custody and parental authority either on a form of the theory of parental rights or alternatively on their notion of child protection, or the best interests of the child.<sup>311</sup> The "best interest of the child"

305. See, e.g., LA. CIV. CODE art. 146; MICH. COMP. LAWS § 552.15 (1967); S.C. COMP. LAWS ANN. § 25-4-45 (1969); WIS. STAT. ANN. § 767.23(1) (West); UTAH CODE ANN. § 30-3-10; ILL. ANN. STAT. ch. 110, § 11-7 (Smith-Hurd 1961).

306. See, e.g., UTAH CODE ANN. § 30-3-10. See also OHIO REV. CODE ANN. § 3109.04 (Page); WIS. STAT. ANN. § 767.24, cited in Mnookin, *supra* note 46, at 232 n.22.

307. Mnookin, *supra* note 46, at 232.

308. See notes 32-44 and accompanying text, *supra*.

309. See notes 241-253 and accompanying text *supra*. See also Roth *supra* note 46, at 423, which indicates that 37 states maintain a "maternal preference" rule, in spite of so-called equalization statutes passed by their legislatures.

310. J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 520 (1852); J. LLOYD, LAW OF DIVORCE 3, 40-145 (1887).

As of 1980, most states in the United States had eliminated any explicit "maternal" or "paternal preference" rule. See, e.g., UTAH CODE ANN. § 30-3-10 (amended 1977); LA. CIV. CODE arts. 146, 157 (amended 1979 & 1977 respectively). Professor Roth indicates, however, that at least 37 of the states which have adopted these so-called "equalization" statutes, still raise a presumption in favor of a "preferred" parent. See authorities cited in Roth, *supra* note 46, at nn.38-52.

311. For a significant time, the distinction between the two theories has perhaps been more one of semantics than of substance. Courts have usually presumed that, barring exceptional circumstances, the child's best interests are served by placing him with his parents. Warburg, *supra* note 47, at 481-82. See, e.g., Whalen v. Olmstead, 61 Conn. 263, 267, 23 A. 964 (1891); Chapsky v. Wood, 26 Kan. 650, 654-58, 40 Am. Rep. 321 (1881); Corrie v. Corrie, 42 Mich. 509, 4 N.W. 213 (1880); English v. English, 32 N.J. Eq. 738, 742-43 (1880).

theory has emphasized protection of the rights or interests of the child as an individual having a legal personality,<sup>312</sup> as well as of the embryo of a future citizen, who needs to be protected by the state for the child's and the state's own good.<sup>313</sup>

Today, appellate courts in the United States, in a manner consistent with courts in France, usually hold that decisions relating to parental authority, in general, and to custody of children, specifically, should be decided on a case-by-case basis, with the trial court having significant discretion to decide the case in the best interests of the child. Of course, the "best interests of the child" standard is vague enough to allow decisions covering the entire spectrum of possibilities. The trial judge may find, in his discretion, that the child's best interests will be served through the validation and enforcement of his or her parents' rights. Alternatively, the judge may find that the child's interests will be best served if custody is awarded to a third party, even though the child's parents are not found to be unfit or to have forfeited their rights.<sup>314</sup>

The best interests standard and its derivatives are indeterminate and speculative for a variety of reasons. One authority has suggested two of the most important reasons: (1) psychological theories are general doctrines which can only imprecisely be applied to specific cases; thus, they cannot guarantee that any decision will in fact be in the best interests of a child; and (2) no consensus exists among scholars or in society generally as to the correct psychological theory.<sup>315</sup> Psychologists and psychiatrists and, *a fortiori*, judges are virtually incapable of predicting what will be in the best interests of the child, at least in the context of a dispute in which both parents compete for custody and in which both parents are fit in all respects.<sup>316</sup>

312. This is opposed to ancient law wherein the child was perceived as property. See notes 1-62 and accompanying text *supra*.

313. See, e.g., cases cited in note 311 *supra*. See generally Oster, *supra* note 304; Mnookin, *supra* note 46.

314. E.g., *Nye v. Nye*, 343 Ill. App. 477, 483, 99 N.E.2d 574, 576 (1951). Social and psychoanalysts Goldstein, Solnit and Freud believe that the standard ought to be that of the "least detrimental available alternative." GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 99. This notion was rejected in *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613, 618 (1922); *Baumann v. Baumann*, 169 Neb. 805, 101 N.W.2d 192, 195 (1960).

315. Mnookin, *supra* note 46, at 229, 257-72. Even the attempt by some states to break down the elements into an itemized list of the "best interests" test does not help the court in most instances. See, e.g., MICH. STAT. ANN. § 25.312(1).

316. See A. Freud, *Child Observation and Prediction of Development — A Memorial Lecture in Honor of Ernst Kris*, reprinted in 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92, 97-98 (1958). See also GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 6, 51-52, 63, 83-84, 114, 168-70 (1973); Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053 (1968); S. ESCALONA, *THE ROOTS OF INDIVIDUALITY: NORMAL PATTERNS OF DEVELOPMENT IN INFANCY* 13 (1968), cited in Mnookin, *supra* note 46, at 259 n.163.

## VI. SUGGESTED REFORM

### A. *Shared Custody*

A dilemma exists. On the one hand, it is virtually impossible to choose between two worthy spouses. On the other hand, it is at least undesirable, and perhaps unconstitutional to employ a shortcut, stereotypical presumption. Dual or shared custody arrangements should be considered. Under such a doctrine, the court, before awarding custody, would still be required to assess the adequacy of care the child would receive and the fitness or suitability of the parents, as well as other factors such as the impact on the child of continued or frequent change and the possibility that the arrangement would promote continued strife. However, absent a factual finding that such an arrangement would be harmful to the child, the court could recognize the retention of parental authority in both of the parents and establish, or encourage the parents to establish, some arrangement based on a principle of concurrent authority with a sharing of duties, responsibilities and benefits. Such an arrangement might help to allay the trauma caused to parents and children by divorce and would eliminate the tendency to use the child as a weapon in the battle for divorce.<sup>317</sup>

The difficulty in advocating a system of shared custody or authority stems from the fact that when a marriage breaks up, our system of laws has heretofore fostered competition, a power struggle for alimony, child support and custody. Unfortunately, this devastating battleground, with the gradual elimination of fault-based divorces and with the elimination of fault-based denial of alimony, has been shifting to the issue of child custody.<sup>318</sup>

Furthermore, the rights and interests of the child, the parents, the family and the state compete in all child custody disputes. This fact has not been accepted by the leading opponents of shared custody.<sup>319</sup> Moreover, these rights

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317. The language of Article 146 of the Louisiana Civil Code before its amendment in 1979, provided room for development of such a shared or joint custody scheme. Article 146 formerly read that the child should be awarded to the wife, "unless there should be strong reasons to deprive her of it, either in whole or in part." Articles 146 and 157, since their respective amendments in 1979 and 1977, both require the determination of whether custody should be awarded to the husband or the wife in accordance with the best interests of the child. Although the articles use the conjunction "or," the tenor and primary aim of the articles seem to be to better promote the best interest and welfare of the children. This being true, it might not be unreasonable and would be consistent with the aim of the articles to award custody to both parents on a controlled basis of sharing rights and obligations vis-a-vis the children.

318. This tendency has been promoted by noted psychoanalysts who believe that it is important for the well-being of the child to have a determination of custody between two disputing spouses made definitively, awarding custody to one of them only. GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 113-33. See Weitzman and Dixon, *supra* note 42.

319. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 180.

and interests have constitutional as well as psychological implications, and, thus, transcend the dissolution of the relationship of the husband and wife.

### B. *Balancing the Rights and Interests of Parents, Children and the State*

In general, issues in the area of child custody turn on whether or not the interests and rights of the child, the parents, the family and the state are in competition and, if they are, in what way. The French Civil Code assumes that children benefit by a continuing relationship with both parents.<sup>320</sup> This assumption precludes situations in which the children of divorced couples are shunted back and forth between parents or in which the courts divide physical or even legal custody of the children between the two parents. The courts award custody to one of the parents; this award is definitive, barring proof that the custodial parent has failed in his or her obligation to rear the children properly. However, notwithstanding this permanent custody award, the non-custodial parent retains the right and obligation to assist materially and spiritually in the rearing of the children. The custodial parent may not inhibit the continuing relationship of the other parent with the child. This system considers such interference by either parent with the other parent's rights and obligations as detrimental to the child *per se*. Such interference can cause the forfeiture of the right. Cooperation forms part of the notion of promoting the child's best interests. Recognition of these rights and obligations and enforcement of them by the courts apparently do not cause more harm to the child, but instead create an atmosphere of cooperation.

In the United States, courts serve a dual function in custody disputes. On the one hand, a court must resolve a dispute between antagonistic parents, both of whom want exclusive custody. On the other hand, a court must protect the child.<sup>321</sup> The solutions to these two problems are not mutually exclusive.

In protecting the particular rights of parents and families in the matter of rearing their children, a community can also further several broader societal interests, including: (1) the sense of fulfillment and joy that parents experience in rearing their children; (2) the positive impact on their children resulting from the intimate and affectionate family environment which only those closest to the children can offer; and (3) societal strength through pluralism and diversity that develops from the freedom of a parent to rear his children.<sup>322</sup>

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320. See § III *supra*.

321. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 180.

322. *Constitution & Family*, *supra* note 50, at 1353. The importance of intimate familiarity between the child and those who rear him relates more to the "psychological parent" than to the biological parent *per se*.

### 1. Constitutional Rights

Given that parents and families have constitutionally protected rights and interests, the following question arises: does a child have the constitutionally protected right not to have the state interfere with his ongoing relationship with both parents. Although experts generally do not dispute the premise that children are better off when both parents assume responsibility together without serious dissention, the argument does not suggest that the child has a constitutional right to the continuation of his family as a unit. Parents, in fact, have the power to dissolve their marital or other relationships. Nevertheless, an argument that the child has constitutionally protected rights to a continuing relationship with both parents and to the input of both parents for his proper rearing, which right may not be interfered with by state action absent clear indications that the continued relationship may harm the child, is tenable. The state has no authority to inhibit a child's relationship with either parent, even at the behest of one of them, unless the relationship would cause some articulable harm to the child.<sup>323</sup> Furthermore, children, although not enjoying rights co-extensive with those of adults,<sup>324</sup> clearly have protected rights under the Constitution, such as the rights to obtain contraceptives and to have an abortion without parental consent,<sup>325</sup> the right to due process,<sup>326</sup> and the right to the protection of the First Amendment.<sup>327</sup>

The authority of parents to direct the rearing of their children is basic in the structure of our society.<sup>328</sup> The primary function of a parent in our society is to care for and nurture his children. This is a parental right which the state can "neither supply nor hinder."<sup>329</sup> Every parent also has a constitutionally protected interest in "the companionship, care, custody, and management of his or her children," because of the importance of protecting the warm, enduring, and important familial bonds which the child and society require.<sup>330</sup>

The growing recognition of the rights belonging to both parent and child transcends the notion of the traditional family. The United States Supreme

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323. See *Prince v. Massachusetts*, 321 U.S. 158 (1949); *Ginsberg v. New York*, 390 U.S. 629 (1968).

324. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605; Solnit, *Child-Rearing and Child Advocacy*, 1976 B.Y.U. L. REV. 723.

325. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

326. *In re Gault*, 387 U.S. 1 (1967). See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

327. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

328. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

329. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

330. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

Court has indicated that a state is prohibited from standardizing its children — and its adults — by forcing them to live in certain narrowly defined family patterns.<sup>331</sup> Protected interests include the extended family<sup>332</sup> and unwed biological parents who have undertaken the responsibility for rearing their children.<sup>333</sup>

## 2. Societal Interests

The parental right or interest to rear one's children is not a right or interest which exists abstractly in all parents or which exists for a parent as an individual simply because of his or her biological or psychological relationship to a child. It is an interest based on the related needs and rights of individuals living together in society. The interest arises from the spiritual, material, and psychological needs of both parents and children who have become or will become part of a parent-child relationship. Thus, although the parent's right to rear his or her child has been the right most often articulated, it is inseparable from a set of concomitant obligations and the right of the child. Moreover, the fulfillment of both the parent's and child's interests serves the state interest.

All mental health professionals agree that depriving a child of his relationship with those he loves, unless there are extreme circumstances, such as child abuse, or continued serious strife in the family, will harm the child.<sup>334</sup> Therefore, the state must retain its *parens patriae* function of protecting children when "their physical or mental health is jeopardized."<sup>335</sup> However, there are constitutional limitations on the state's application of this power.<sup>336</sup>

## VII. CONCLUSION

The concept of parental authority is in the process of evolution. Until recently, modern usage of the concept resembled, in many respects, the attenuated *patria potestas* of later Roman law. Even under the Empire of Constantine, the state perceived the role of the father less as a function of *pater familias* and more in terms of the family *qua* family. The Germanic concept of *mundium* contributed to the recognition that parental rights also entail parental obligations. France adopted the combined notions of rights, obligations and

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331. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). See also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

332. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

333. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979).

334. *Constitution & Family*, *supra* note 50, at 1317-20.

335. *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979).

336. *Constitution & Family*, *supra* note 50, at 1317.

responsibility inherent in *mundium* under the *droit coutumier* of the north. The progressively modern approach of the current French Civil Code goes back to the *droit coutumier*, under which *la puissance paternelle* belonged to the mother as well as the father. The Civil Code, while codifying in a uniform, coherent manner the rights and obligations comprising parental authority, also gives the system flexibility to adapt to the needs and interests of the family. Underlying the Civil Code is the policy that parental authority exists as a shared task to promote the felicity of the family, and consequently the best interests of the child.

The Civil Code's coherent conceptualization of familial rights and duties provides the French courts with a solution to most cases in which both parents desire to rear their children after divorce. The French view is that a child benefits from a continuing, healthy relationship with both divorced parents. Such a set of relationships requires that all parties work together to achieve a common goal. The legislators have undertaken to facilitate such cooperation without abrogating the fundamental rights of either parent or child.

Although there has never been a coherent policy regarding parental authority in the United States, with the possible exception of Louisiana, the Supreme Court and various federal appellate courts have attempted to establish a measure of uniformity to define the rights and obligations arising out of the parent-child relationship.<sup>337</sup> The Supreme Court has held that the family, as an entity, has an interest in its own autonomy and in the privacy of its members.<sup>338</sup>

Most child custody statutes today reflect an overreaction to divorce by taking from the non-custodial parent and the child many of the rights arising from their relationship, rather than promoting a continuation of these rights and the relationship which may be most beneficial to the child. Statutes relating to child custody, for whatever purpose, should be redrafted so as to focus on the continuing substantive rights of both the parent and the child. They should be drafted to promote the basic policy that parent and child are both best served by maintenance of their relationship, unless clear and articulable harm will result to the child therefrom. The statutes should be drawn narrowly to provide for the least possible interference with the fundamental

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337. See note 296 and accompanying text *supra*. The early 19th century decisions, which refused to withdraw children from parental custody barring a clear showing of unfitness, acknowledged, nonetheless, that the child's welfare, not the parental right, was the paramount interest involved.

338. *E.g.*, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1977) (integrity of the family unit protected by the 9th and 14th amendments); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (there exists a private realm of family life that the state cannot enter); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *But see* *Reynolds v. U.S.*, 98 U.S. 145 (1878).



rights and psychological needs of parent and child. The laws should be drafted in a manner that will indicate the substantive rights and obligations of parents and children in all circumstances.<sup>339</sup> This approach would replace "the best interests of the child" standard with a "prevention of harm to the child" or "least detrimental alternative" approach, built upon the primary notion that children, parents and society will be served best by maintenance of the parent-child relationship.

Many courts have disapproved of joint or shared custody arrangements on the ground that such an arrangement would frustrate the child's need for stability and consistency.<sup>340</sup> Many judges follow psychoanalysts Goldstein, Freud and Solnit and question the ability of all but the most exceptional divorced parents to cooperate with each other even within the limited realm of serving the well-being of their children.<sup>341</sup> Goldstein, Freud and Solnit argue that for optimal psycho-social development, children require a sharply defined locus of authority. These psychoanalysts draw from this fact their major objection to joint or shared custody arrangements: that the fluidity of such an arrangement might induce a highly detrimental psychological instability.<sup>342</sup>

Children need stability and a sharply defined locus of authority. However, the argument that the authority will be any less focused or defined after divorce within a joint or shared custody arrangement than it is in an ongoing marriage does not necessarily follow from this premise. Indeed, during the

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339. See *Constitution & Family*, *supra* note 50, at 1323, 1325. See also GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 31, 113-33. The Goldstein position is criticized in Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996, 1002 (1974); Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L. J. 1304, 1310 (1974); See generally Benedek & Benedek, *Post Divorce Visitation: A Child's Right*, 16 J. AMER. ACAD. OF CHILD PSYCH. 256-71 (1977); M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 119-20 (1978) [hereinafter cited as ROMAN & HADDAD]; Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCH. 320, 325-26 (1979) [hereinafter cited as Abarbanel]; H. BILLER, *FATHER, CHILD AND SEX ROLE* 86 (1971) [hereinafter cited as BILLER]; J. DESPERT, *CHILDREN OF DIVORCE* 83 (1959) [hereinafter cited as DESPERT]; Grote & Weinstein, *Joint Custody: A Viable and Ideal Alternative*, 1 J. DIVORCE 43, 48-50 (1977) [hereinafter cited as Grote & Weinstein]; Folberg & Graham, *supra* note 3, at 529; Weitzman & Dixon, *supra* note 42. See also Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interest of the Child*, 13 FAM. L. Q. 49 (1979); M. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of BEFORE THE BEST INTERESTS OF THE CHILD*, 78 MICH. L. REV. 645 (1980).

340. See, e.g., *Utley v. Utley*, 364 A.2d 1167, 1170 (D.C. 1976); *In re Marriage of Pergament*, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977); *Cradic v. Cradic*, 544 S.W.2d 605, 607 (Mo. App. 1977); *Ponder v. Rice*, 479 S.W.2d 90, 94 (Tex. Civ. App. 1972); *Rickard v. Rickard*, 7 Wash. App. 907, 911-12, 503 P.2d 763, 766 (1973); *Lumbra v. Lumbra*, 136 Vt. 529, 531-33, 394 A.2d 1139, 1141-42 (1978).

341. E.g., *Schexnayder v. Schexnayder*, 343 So.2d 393, 396 (La. App. 4th Cir. 1977); *Braiman v. Braiman*, 44 N.Y.2d 584, 589-90, 378 N.E.2d 1019, 1021 (1978); *Dodd v. Dodd*, 93 Misc.2d 641, 403 N.Y.S.2d 401, 405 (1978); *Dunavant v. Dunavant*, 31 Tenn. App. 634, 219 S.W.2d 910, 915-16 (1949), cited in *Constitution & Family*, *supra* note 50, at 1325 n.95.

342. GOLDSTEIN, FREUD & SOLNIT, *supra* note 180, at 31-34, 37-39; *Constitution & Family*, *supra* note 50, at 1325. But see Folberg & Graham, *supra* note 3, at 556-61.

marriage, both parents have concurrent authority over their children. If the relationship is working as it optimally should, the parents will discuss any disagreement and work out a method of best serving their children. If the marriage is not working at its optimum pitch, disputes will arise. Sometimes divorce ensues. Although divorced parents live apart and sometimes have disagreeable feelings towards each other, the argument that divorced parents cannot discuss problems about rearing their children and work out solutions to any disagreement is not necessarily valid. Where *de facto* shared custody arrangements have been attempted, this cooperative process has been known to work.<sup>343</sup> There is no reason, notwithstanding the beliefs of opponents of shared custody, that legislatively or judicially encouraged cooperation should not also work.

The problems raised by these opponents are significant. These opponents, in fact, penetrate the core of the child custody problem. While there is no doubt that children within and without the ongoing traditional marriage are damaged by continual bickering and instability, the assumption that legislatively or judicially encouraged cooperation in shared custody after divorce is detrimental *per se* is erroneous. If the parents do not wish to cooperate or are incapable of cooperating, and evidence indicates significant hostility between them, no shared custody arrangement should be approved. This is not much different from saying that parents should resolve their problems within the marriage or get a divorce.

An additional argument made against shared custody is that the child may be hurt if he is required to make continual changes in residence over significant distance and time. Although this argument may be true, to apply it to shared custody or shared parental authority assumes that shared custody requires exchange of the child's residence between the parents. Many courts' social science analysts have confused shared custody with divided custody. Shared custody ought to be viewed as a sharing of authority, i.e., rights and obligations in the rearing of the child, rather than simply the right to have a fixed amount of the child's physical presence. This would allow fulfillment of the parental authority function and maintain the rights and interests of those involved.<sup>344</sup>

Statutes relating to child custody after divorce should establish a rebuttable presumption that the child will be most benefited or, preferably, least harmed by an arrangement whereby he or she will have the continuing contribution and love of both parents. The presumption can be rebutted by a showing that

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343. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 31 (1979).

344. For a discussion of the differences in types of custody arrangements and some useful ideas regarding solutions to child custody problems, see Folberg and Graham, *supra* note 3, at 526-30.

such an arrangement will harm the child. However, the harm should be articulable and clearly shown. Such a statute should not provide the courts with a short-cut assumption that promotion of shared authority arrangements is harmful. Such an assumption does not comport with reality and it violates fundamental interests of the child, the parents and society. Furthermore, such an assumption engenders rather than eliminates hostile litigation over the custody of the children.

The suggested statutory mechanism provides a judge with at least one additional step in his determination of what would best benefit the child. The first step to be taken under this scheme would be for the judge, who has been presented with a child custody dispute, to suggest to the parties and their attorneys that they develop a plan whereby both parents would contribute to the rearing of the child. Animosity on the part of one spouse to another, or any purpose inimical to the welfare of the child motivated by a desire to obtain sole custody or authority would indicate to the court that the parent willing to cooperate should have sole custody. Of course, under this scheme, either parent could prove that the other was unfit to have custody over the child or even to participate in the rearing of the child. An attempt to raise this contention without evidence or out of spite or animosity would be an abuse of the process. This abuse would indicate that the parent has failed in his or her obligation to protect the child's best interests and should thereby forfeit his or her rights. This would help to take the "weapon" of child custody out of the parents' hands, and would promote the interests of all involved. Of course, if both parents were incapable of cooperating and the court finds that shared custody would be harmful to the child, the court could decide, as under present practice, which parent would be least harmful to the child.

Such an approach would encourage parental cooperation. If the parents participate in a shared custody arrangement, the destructive psychological impact of the divorce would be reduced, as continued input by both parents would eliminate some of the child's sense of loss, guilt, and inadequacy which typically accompany divorce.<sup>345</sup> In addition, the arrangement would allow parents to share equitably the burden of parenting, thereby avoiding what has been called the "single-parent overload," experienced by sole custodial parents.<sup>346</sup>

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345. ROMAN & HADDAD, *supra* note 339; Arbarbanel, *supra* note 339.

346. *Constitution & Family*, *supra* note 50, at 1325; E. LEMASTERS, PARENTS IN MODERN AMERICA 160-66 (1977); Folberg and Graham, *supra* note 3, at 553-56. The amount of "overload" in the United States is significant.

Dr. U. Bronfenbrenner of Cornell University provides the following statistics: As of 1974, one of every six children in the United States was living in a family with only one parent. About 95 percent of these families were headed by the mother and a significant number of these mothers were working; 67 percent of them with school-aged children; 54 percent of them with children under the age of six; 45 percent of them with children under the age of three. Ninety percent of these households do not have the advantage of the extended family existence. Bronfenbrenner,

Psychological evidence shows that a child adjusts better to a divorce if his parents cooperate in his rearing and continue to involve themselves in his development.<sup>347</sup> Therefore, the argument which suggests the approach that disputed custody ought to be awarded to only one of the parents in all cases, at least in the sense that it has been understood by the courts, is simplistic. Although designed to prevent litigation, this approach actually engenders more frequent and bitter litigation with the child as a pawn or as a weapon. Furthermore, under this approach the parents get a powerful vehicle for vindictiveness which is clearly damaging to the child.

The author proposes that the courts should presume that the child will be better off if the parents cooperate even after divorce. Moreover, the law should encourage parents to cooperate by requiring them to submit a plan of shared custody or authority based on their cooperation. The author believes that such an approach would eventually reduce both conflict and use of custody litigation to hurt an ex-spouse. Underlying this approach is voluntary cooperation in shared authority over the child, with the *proviso* that the court will withdraw a parent's authority (not award it in the first place) if the parent uses that authority for any purpose other than for the benefit of the child.

During a shared custody arrangement disagreements and disputes between the parents probably would occur. Indeed, disagreement between parents regarding the proper way to rear their children is not unlikely. Occasionally, parents may not be able to resolve their disagreement. However, the reality of an inevitable disagreement should not cause the courts to avoid their responsibility to enforce the fundamental rights of parents and children.

If the parents simply disagree on a specific course of action, the court first should encourage the parents to resolve the problem themselves. If parents cannot resolve the problem, the court could make an appropriate decision based on what is best for the child. In making its decision, the court may consider, among other factors, which parent has spent more time and effort on the education of the child and which parent is more available to assist and help the child.

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*Reality and Research in the Ecology of Human Development*, 119 PROC. OF THE AM. PHIL. SOC'Y 439, 442-43 (1975), cited in Roth, *supra* note 46, at 455-56.

347. *Constitution & Family*, *supra* note 50, at 1325. See M. Newman, Summary of Some Current Literature Bearing on Joint Custody (1980) (unpublished paper presented to Utah State Legislature). See BILLER, *supra* note 339; DESPERT, *supra* note 339; R. WEISS, MARITAL SEPARATION 230 (1975); Grote & Weinstein, *supra* note 339; Gaddis & Bintliff, *supra* note 50. See also H. BILLER, PATERNAL DEPRIVATION, (1974); Jacobson, *The Impact of Marital Separation/Divorce on Children: Parent-Child Separation and Child Adjustment*, 4 J. DIVORCE 341 (1978); M. Kotelchuck, The Nature of the Child's Tie to his Father, (1972) (unpublished doctoral dissertation, Harvard University); Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 HUMAN DEV. 245-66 (1975); Lamb, *Interaction Between Eight-Month-Olds and Their Fathers and Mothers*, cited in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (M. Lamb ed. 1976); Marcus, *The Child as Elicitor of Parental Sanctions for Independent and Dependent Behavior: A Simulation of Parent-Child Interaction*, 11 DEV. PSYCH. 443-52 (1975); Rosen, *Some Crucial Issues Concerning Children of Divorce*, 3 J. DIVORCE

Of course, if the shared custody arrangement should break down, just as when a marriage breaks down, the court would have to either promote a solution of the specific problem or end the arrangement. If the arrangement has failed to the point of harming the child, the court should decide which parent is primarily responsible for the breakdown, and which parent will better serve the child's needs by having full custodial authority over him. This decision is no different from the decision that must be made in the instance where the court is following the traditional approach of deciding which parent should have full and exclusive custody. The author submits that such cases of unresolvable dispute will not be so frequent as to overburden the judicial system. A system similar to the one suggested in this article now functions in France. Moreover, the author believes that the frequency of these disputes would decline as society accepted the belief that parents who have ended their marital relationship need not necessarily end their parent-child relationship. Parents can continue to cooperate in the proper rearing of their children. Courts should not discourage this development; indeed, they have a duty to encourage it.

Some courts are, in fact, beginning to encourage shared custody arrangements,<sup>348</sup> and some states are beginning to develop shared custody statutes.<sup>349</sup> The author suggests that the Constitution may prohibit the states

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19-25 (1979); Suttan-Smith, Rosenberg, & Landy, *Father Absence Effects in Families of Different Sibling Compositions*, 39 CHILD DEV. 1213-21 (1968); U.S. BUREAU OF THE CENSUS, CHARACTERISTICS OF AMERICAN CHILDREN AND YOUTH, 1976, 66 CURRENT POPULATION REPORTS, SERIES P-23, at 24 (1978); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600-16 (1975); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Latter Latency*, 46 AM. J. OF ORTHOPSYCH. 256-69 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, 3 THE CHILD AND HIS FAMILY 479-505 (1974); Wallerstein & Kelly, *Children of Divorce: A Review*, 24 SOC. WORK 470 (1979); Wattenberg & Reinhardt, *Female-Headed Families: Trends and Implications*, 24 SOC. WORK 460-67 (1979).

348. *E.g.*, Childers v. O'Neal, 251 Ark. 1097, 476 S.W.2d 799 (1972); Roth v. Roth, 52 Ill. App.3d 220, 367 N.E.2d 442 (1977); Mayer v. Mayer, 150 N.J. Super. 556, 561, 376 A.2d 214, 217 (1977); Odette R. v. Douglas R., 91 Misc.2d 792, 399 N.Y.S.2d 93, 95-96 (1977); Schilleman v. Schilleman, 61 Mich. App. 446, 232 N.W.2d 737 (1975); Perotti v. Perotti, 78 Misc.2d 131, 355 N.Y.S.2d 68 (1974).

349. Some states have adopted joint custody statutes. For example, in 1977, the Oregon legislature explicitly authorized joint custody. (OR. REV. STAT. § 107.105(1)). It states simply that the court has the power to decree that the future care and custody of the minor children of the marriage shall be by one party or jointly whichever may be deemed just and proper. *Id.* Formerly courts in Oregon had applied the statute on custody to allow joint custody when the facts merited it. Folberg & Graham, *supra* note 3, at 542. The former Oregon law read, "[w]henever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows: (A) for the future care and custody of the minor children of the marriage as it may deem just and proper." Oregon's legislature did not adopt the house bill on joint custody. This bill would have encouraged joint custody in keeping with a list of certain circumstances which indicated when joint custody might be appropriate. See House Bill 2532, Oregon Legislative Assembly, Reg. Sess. (1977), cited in Folberg & Graham, *supra* note 3, at 543.

Wisconsin adopted a joint custody provision on February 1, 1978, which provides joint custody as an option "if the parties so agree and if the court finds that a joint custody arrangement would be in the best interest of the child or children." WIS. STAT. ANN. § 767.24(1)(b)

from establishing statutes which discourage cooperation or provide parents with the potential weapon of child custody that could be used for vindictive purposes. Furthermore, the Constitution may require the states to avoid establishing obstacles to shared custody arrangements. The Constitution may even oblige the states to promote arrangements such as requiring parents to negotiate a program or arrangement of shared authority. However, any such laws should emphasize that shared custody signifies shared authority and responsibility for the child, and not necessarily divided physical custody. The law should encourage divorced parents to benefit their children by permitting them to take part in the parenting process, even though the relationship between them as spouses has ended. The various states of the United States should develop the Civil Code's view of parental authority more fully in their laws. At the same time, the states should consider the experiences of the civil code countries. The states could adopt the benefits of conceptual coherency and other positive elements of the French system while utilizing the procedural advantages and flexibility that exist in common law systems.

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(West Cum. Supp. 1980). Under this law, joint custody means that, "both parties have equal rights and responsibilities to the minor children and neither parties' rights are superior." *Id.*

The Utah Legislature has had a bill introduced which provides that joint custody is in the best interests of the child when the parents have agreed to it. In addition, the bill would create a "custody arbitration and recommendation pool," to be composed of a psychologist, social worker or marriage counselor, and two local residents with experience in family problems. This "pool" would make recommendations to the court.

Since 1977, Iowa's statute has provided that, "[w]hen a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified. The order may include provision for joint custody or the children by the parties. . . ." IOWA CODE ANN. § 598.21 (West Cum. Supp. 1978-1979). North Carolina's statute provides that, "[a]n order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same. . . ." N.C. GEN. STAT. § 50-13.2(b).

Maine's statute provides that, "[the judge] may decree which parent shall have the exclusive care and custody of the person of such minor or he may apportion the care and custody of the said minor between the parents, as the good of the child may require." ME. REV. STAT. ANN., tit. 18, § 217, cited in Folberg & Graham, *supra* note 3, at 543.

California has promulgated, effective January 1, 1980, an act which provides that custody be awarded first to both parents jointly. Under this statute joint custody enjoys a presumption of being in the best interest of the child when parents have agreed previously to it or agree to it in court. CAL. CIV. CODE § 4600 (West). Article 4600 provides further that if joint custody is not appropriate, custody shall be awarded to one or the other of the parents. Moreover, "[i]n making an order for custody to either parent, the Court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact . . ." with the other parent. *Id.* at §§ 4600, 4600.5.

Finally, Kansas has recently promulgated a joint custody act which provides that the courts "may give the care and custody of [the minor children] . . . to the parties jointly if the parties so agree and if the court finds that a joint custody arrangement would be in the best interests of the child or children." KAN. STAT. ANN. § 60-160(b)(1). "Joint custody under this subsection means that both parties have equal rights and responsibilities to the minor child, subject to orders of the court, and neither parties' rights are superior." *Id.* See generally Foster & Freed, *supra* note 32 at 343 for a chart and discussion of various laws on joint custody. See also Foster & Freed, *Joint Custody: Legislative Reform*, 16 TRIAL 22 (June 1980).